FILE COPY

No. 389

In the Supreme Court of the United States

October Term, 1959

Federal Trade Commission, petitioner

v.

Anheuser-Busch, Inc.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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competition or tend to create a monopoly *in any line of commerce,* or to injure, destroy, or prevent competition with any person who either *grants* or knowingly receives the benefit of such discrimination, or with customers of either of them" (emphasis added). The language of the section thus extends to *all* competitive injury resulting from unjustified differential pricing. Equally banned with the discrimination which may injure competition with the person who "receives" the benefit of such discrimination is the discrimination which may injure competition with the person who "grants" it. In short, a seller may not discriminate where the effect may be to injure competition either with himself *or* with his customers.

A reading of the section which will give effect to all of its parts requires that the word "discriminate" be taken in its primary dictionary meaning of "distinguish" (Webster's New International Dictionary, 2d. ed., p. 745). Thus, "any person" distinguishing (or "differentiating") in the price charged "different purchasers of commodities of like grade and quality" discriminates in price between them, and this discrimination is prohibited by § 2(a) if it has the statutory effect on *any* level of competition. The court below, in incorporating the concept that the purchasers accorded different prices must be in competition with one another and that there must be a "relationship between the different purchasers which entitles them to comparable treatment", has given "discriminate" its secondary dictionary meaning of "differen[tiating] in treatment or favor (of one as compared with others)" (*ibid.*)—*i.e.,* differentiating "un-

fairly." It thereby makes the prevention of injury to one particular level of competition—seller competition—depend upon the fortuitous concurrence with such injury of a competitive relationship between purchasers. This renders the section largely ineffective as a means of reaching territorial discrimination which causes injury in the seller line. To put it in terms of the present case, the court has read the statute to afford protection against injury to competition among the sellers of beer in St. Louis arising out of respondent's localized price cutting if, but only if, some of the retail purchasers of respondent's beer in St. Louis are shown to be in competition with retail purchasers outside the area of the price cuts. This result cannot be squared with the comprehensive language of the section.

B. THE LEGISLATIVE HISTORY

The legislative history confirms the conclusion that Section 2 prohibits territorial price discrimination injurious to a seller's competition in a particular market or locality irrespective of whether there is competition between those who buy at different prices. The pertinent statutory language stems from the original Section 2 of the Clayton Act, 38 Stat. 730, which read in relevant part:

> That it shall be unlawful for any person engaged in commerce * * * to discriminate in price between different purchasers of commodities, * * * where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce * * *.

Thus, the language as to price discrimination between different purchasers was the same as it is now,[6] but the section did not include the provision prohibiting such discriminations where the effect may be "to injure, destroy, or prevent competition with any person who * * * grants * * * the benefit of such discrimination." Despite the absence of any express language relating to those who compete with the grantor of the discrimination, it is clear that one of the major purposes of Congress when Section 2 was originally enacted in 1914 was to protect competing sellers. The House Judiciary Committee report on the bill which became the Clayton Act stated (H. Rep. 627, 63d Cong., 2d Sess., pp. 8–9):[7]

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[6] The original Section 2 contained a proviso eliminating from the Act's coverage "discrimination in price between purchasers of commodities on account of differences in the grade [or] quality * * * of the commodity sold * * *" 38 Stat. 730. In the Robinson-Patman Act this exception was brought up into the main body of the section and the prohibition now only applies to discriminations between "purchasers of commodities of like grade and quality."

[7] In the bill as reported by the House Committee, Section 2 made it unlawful to "discriminate in price between different purchasers of commodities *in the same or different sections or communities*" (H. Rep. 627, *supra*, p. 1). The italicized phrase was later dropped, but without any purpose to change the section's meaning. The Senate Judiciary Committee in reporting, with amendments, the bill passed by the House, explained omission of the phrase as follows (S. Rep. 698, 63d Cong., 2d Sess., p. 43):

"The words 'in the same or different sections or communities,' in the first part of this section, are stricken out because they are either surplusage, when applied to 'commerce,' as defined in the bill; or if they are used in a more restricted sense, in a sense which would apply them to local transactions merely, they would attempt to regulate intrastate commerce and be therefore void."

> It [Section 2] is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations * * * have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a price less in the particular communities where their rivals are engaged in business than at other places throughout the country. * * * Such a system or practice is so manifestly unfair and unjust, not only to competitors who are directly injured thereby but to the general public, that your committee is strongly of the opinion that the present antitrust laws ought to be supplemented by making this particular form of discrimination a specific offense under the law when practiced by those engaged in commerce.

This concern of the original Section 2 with area price discrimination which injured competitors of the offending seller is further shown by the House Report's emphasis on the inadequacy of existing state laws to deal with this very problem (*id.*, p. 9).

> It is important that these State statutes be supplemented by additional legislation by Congress, for it is now possible for one of these great corporations doing business in * * * the 48 States * * * to lower [its] prices * * * in a particular State and sell within that State at a uniform price in compliance with State laws, and thereby destroy the business of all * * * competitors operating within the State. * * *

See, also, S. Rep. 698, 63d Cong., 2d Sess., pp. 2-4. Indeed, the legislative history of the original Section

2 concentrated so heavily on the evil of a pricing practice which harmed the rivals of the seller that at least one court construed the section to apply *only* to the harm to competition with the seller. *Mennen Co.* v. *Federal Trade Commission,* 288 Fed. 774, 778-779 (C.A. 2), certiorari denied, 262 U.S. 759.[8]

There was no departure from the objective of protecting seller competition when Section 2 was amended, in 1936, by the Robinson-Patman Act. Indeed, the only significant change in the relevant language, as noted above (p. 14), was the addition of new "effect" language which speaks of injury to competitors of either the giver *or* receiver of a price discrimination. Indisputably, Congress intended the 1936 amendments to the section to expand its coverage without impairing existing prohibitions. H. Rep. 2287, 74th Cong., 2d Sess., p. 8; S. Rep. 1502, 74th Cong., 2d Sess., p. 4. As this Court said in a territorial price discrimination case involving (as here) injury to seller competition (*Moore* v. *Mead's Fine Bread Co.,* 348 U.S. 115, 120):

> This type of price cutting was held to be "foreign to any legitimate commercial competition" even prior to the Robinson-Patman Act. * * * It seems plain to us that Congress went at least that far in the Robinson-Patman Act. * * *

The court below relied on a statement by Representative Utterback, the House manager of the conference

[8] **This restriction was later disapproved by this Court,** which held that the ban of the section extended to injury to the line of commerce engaged in by purchasers as well as that by sellers. *Van Camp & Sons* v. *American Can Co.*, 278 U.S. 245, 254.

bill which became the Robinson-Patman Act, in which he observed that the word "discrimination" implies "some relationship" between the parties affected which "entitles them to equal treatment," as when they compete in resale of the goods concerned; but "where no such relationship exists, where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale to different customers at those different prices would not constitute a discrimination within the meaning of this bill" (R. 1519). But Representative Utterback's exposition must be read in the context of the problem to which it was addressed. Congress, in 1936, was principally concerned not with area price cutting directed at rivals of the seller, but with certain undesirable practices which affected competition between buyers—practices which, Congress believed, might be inadequately covered. It was particularly concerned that large buyers, because of the leverage of their mass buying power, could obtain price or other concessions not allowed to the smaller customers of the same seller. H. Rep. 2287, 74th Cong., 2d Sess., pp. 3-4, 7; S. Rep. 1502, 74th Cong., 2d Sess., p. 3.[9] It is understandable that a statement prompted by this dominant concern should speak of the need for

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[9] This Court has recognized that the main thrust of the Robinson-Patman Act amendments was directed at abuses of buying power, rather than selling power. In *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 43, the Court said: "The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. * * *"

the existence of competition as between the respective buyers. See *Purex Corp.*, 51 FTC 100, 105–108.[10]

Shortly after he made the statement upon which the court below relied, Congressman Utterback went on to declare that Section 2, as amended, would prohibit territorial price discriminations injurious to competition with the seller. He explained that previously Section 2 required "a showing of effect upon competitive conditions generally in the line of commerce and market territory concerned, as distinguished from the effect of the discrimination upon immediate competition with the grantor or grantee" (80 Cong. Rec. 9417). He then stated (*ibid.*):

> The difference may be illustrated where a nonresident concern opens a new branch beside a local concern, and with the use of discriminatory prices destroys and replaces the local concern as the competitor in the local field. Competition in the local field generally has not been lessened, since one competitor has been replaced by another; but competition with the grantor of the discrimination has been destroyed. The present bill is, therefore, less rigorous in its provisions as to the effect re-

[10] The Utterback definition of "discrimination" has been criticized as "ambiguous and misleading". Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act* (2d rev. ed., 1959), p. 18. It has also been suggested that the definition is too restrictive because while "the definition speaks of a relationship between the purchasers involved, the act is also concerned with the relationship between the seller and his own competitors, known as 'primary line' competition." Haslett, *Price Discriminations and Their Justifications under the Robinson-Patman Act of 1936*, 46 Mich. L. Rev. 450, 454 (1948).

quired to be shown in order to bring a given discrimination within its prohibitions.

Significantly, the illustration which the Congressman chose is the prototype of the territorial price discrimination case—the situation where a large multistate seller of superior resources raids a local market by cutting its prices in the locality with a view to injuring or eliminating its own competition in that market. Compare *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115.

C. THE PRIOR DECISIONS

With one possible exception, decisions involving territorial price discrimination have recognized that a lowering of the seller's price in a particular locality is a price discrimination prohibited by Section 2 of the Act if its effect may be to injure competition in either the primary (the seller's) or the secondary (the buyers') line of commerce. See *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115; *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950 (C.A. 10); *E. B. Muller & Co.* v. *F.T.C.*, 142 F. 2d 511 (C.A. 6); *Maryland Baking Co.* v. *F.T.C.*, 243 F. 2d 716 (C.A. 4); *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234 (C.A. 2), certiorari denied, 279 U.S. 858; *Samuel H. Moss, Inc.*, v. *F.T.C.*, 148 F. 2d 378, 155 F. 2d 1016 (C.A. 2), certiorari denied, 326 U.S. 734; but compare *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356 (C.A. 9), certiorari denied, 350 U.S. 991.[11]

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[11] In a number of cases involving application of Section 2 in other contexts, price discrimination is spoken of merely in terms of a difference in price. *F.T.C.* v. *Simplicity Pattern*

The recent *Atlas Building* case, like this one, involved a charge that a multi-state seller had engaged in territorial price discrimination, with consequent injury to his competitors in the area of the price cut. The Tenth Circuit expressly upheld the trial court's refusal to instruct the jury that the price discrimination must be between different purchasers "in direct competition with each other" (269 F. 2d at 953) and rejected the contention that "geographic price differentials or discriminations between noncompeting purchasers in different localities are not actionable under Section 2(a) * * *" (p. 954). Referring to the Seventh Circuit's holding in the instant case that "the statutory words 'different purchasers' means competing purchasers," the Tenth Circuit "respectfully reject[ed] any such restriction upon Section 2(a)" (p. 955).

In *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, this Court sustained a judgment for the plaintiff in a treble damage action based on both Section 2(a) of the Clayton Act and Section 3 of the Robinson-Patman Act where the facts showed that a bakery engaged

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Co., 360 U.S. 55, 64, 68; *F.T.C. v. Cement Institute*, 333 U.S. 683, 721–726; *F.T.C. v. Staley Mfg. Co.*, 324 U.S. 746, 757; *Moog Industries v. F.T.C.*, 238 F. 2d 43, 49 (C.A. 8), affirmed, 355 U.S. 411. The writers likewise tend to define discrimination in terms of a difference in price. Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act* (2d rev. ed., 1959), pp. 19–21; Crowley, *Equal Price Treatment under the Robinson-Patman Act*, 95 U. of Pa. L. Rev. 306, 325–326 (1947); Haslett, *Price Discriminations and Their Justifications under the Robinson-Patman Act of 1936*, 46 Mich. L. Rev. 450, 454 (1948); McAllister, *Price Control by Law in the United States*, 4 Law & Contemp. Prob. 273, 291 (1937).

in selling bread in various places in New Mexico and Texas cut its prices in half in one town (Clovis, N. Mex.), while making no cut in prices elsewhere, with the result that a rival Clovis bakery was forced out of business. Neither this Court's opinion nor the several opinions below (see 184 F. 2d 338; 190 F. 2d 540; 208 F. 2d 777) make any reference to the existence of competition as between the seller's Clovis customers and its customers in other areas. The Court nevertheless regarded it as clear that both the Clayton Act and the Robinson-Patman Act outlawed "the price cutting employed by respondent" (348 U.S. at 120).[12]

Similarly, in the *Porto Rican, Maryland Baking* and *Moss* cases, *supra,* there was no showing that the seller's customers in the area of the price cut competed with its customers elsewhere.[13] In the *Muller* case, the record did show discrimination between "competing customers," but the effect on competition of the territorial price discrimination was discussed solely in terms of its effect on a competitor of the seller, and the Sixth Circuit stated that "the statute requires only that the discrimination be between 'different purchasers * * *'." 142 F. 2d at 518.[14]

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[12] We recognize that the issue primarily raised and decided was whether the statutory provisions found to have been violated apply to wholly intrastate sales of a company engaged in an interstate business.

[13] The *Moss* case was cited in *F.T.C.* v. *Morton Salt Co.*, 334 U.S. 37, for the proposition "that proof of a price differential in itself constituted 'discrimination in price,' where the competitive injury in question was between sellers" (p. 45, n. 13).

[14] *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356 (C.A. 9), certiorari denied, 350 U.S. 991, relied on by respondent (Br. in Opp., pp. 18–19), does contain language which in-

Respondent's discussion of these cases (Br. in Opp. pp. 16–17) avoids the issue whether there can be a violation of Section 2(a) where the purchasers are not in competition. Instead, respondent focuses upon the facts which led the courts, in the cited cases, to conclude that the price discriminations had prohibited effects upon competition with the seller, suggesting that there is no comparable proof of injury here. We disagree with this suggestion, but in all events the analysis has nothing to do with the decision of the court below which found it quite unnecessary to consider whether (as the Commission found) respondent's local price cuts substantially lessened competition or tended to monopoly. This case is before this Court because the Court of Appeals was of the view that there could be no discrimination within the meaning of Section 2(a), even though the price cuts "were directed at [respondent's] local competitors," inasmuch as respondent's customers in St. Louis were charged like prices and its customers in other areas were not in competition with the St. Louis distributors.

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dicates that discrimination requires that the seller's customers be in competition with each other, 231 F. 2d at 367–368. But the grounds of decision were that the seller had "actually acted in good faith to meet the low prices of some of its competitors" (231 F. 2d at 366) and "that there was no causal connection between the different prices * * * and any damage sustained by [the competitors] as a result of the lowering of prices * * *" (231 F. 2d at 367). See, also, the comment on *Balian* in *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950, 955 (C.A. 10).

D. THE RELATIONSHIP BETWEEN SECTION 2 OF THE CLAYTON ACT AND SECTION 3 OF THE ROBINSON-PATMAN ACT

Having concluded that the ban of Section 2 does not extend to geographical price discriminations (save in the circumstance where a purchaser outside the area of the price cut is in competition with a purchaser within the area), the court below looked to Section 3 of the Robinson-Patman Act to reinforce this conclusion.[15] Reasoning that Congress dealt with "geographical price discriminations and selling at unreasonably low prices" in Section 3, the court refused to countenance what it regarded as "an attempt by [petitioner] to enlarge the scope of section 2(a) to include a matter lying expressly within the scope of section 3" (R. 1521). But, as this Court has held, *Nashville Milk Co.* v. *Carnation Co.,* 355 U.S. 373, the fact that there is "a partial overlap between the price-discrimination clauses" of Section 3 of the Robinson-Patman Act and those of Section 2 of the Clayton Act, as amended, does not delimit the latter section. 355 U.S. at 378. This Court stressed "the independent force of the Clayton Act" as applied to

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[15] Section 3 of the Robinson-Patman Act, 49 Stat. 1528, 15 U.S.C. 13a, provides in pertinent part:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, * * * to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both."

price discriminations "common to" both Section 2 of the Clayton Act and Section 3 of the Robinson-Patman Act, stating that the prohibitions of Section 3 "are in no way inconsistent with the provisions of the Clayton Act amendment," and that "Section 3 [of the Robinson-Patman Act] authorizes nothing which that amendment prohibits, and takes nothing from it" (pp. 380, 381). See also p. 381, n. 12.

Moreover, in the companion case of *Safeway Stores v. Vance,* 355 U.S. 389, involving a treble damage action grounded upon both statutory provisions and alleging "territorial discrimination in prices" as well as "sales at unreasonably low prices" (see *Vance v. Safeway Stores,* 239 F. 2d 144, 145 (C.A. 10)), this Court dismissed the complaint "insofar as it rests on alleged unlawful selling at unreasonably low prices" (on the ground that the only statutory remedy for an offense falling only under Section 3 of the Robinson-Patman Act is a criminal proceeding), but remanded the case for trial on the charge of "unlawful price discrimination." 355 U.S. at 390.[16]

[16] Following the logic of this Court's decisions in *Nashville Milk* and *Safeway Stores*, the Tenth Circuit, in *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950, refused to dismiss a geographical price discrimination under Section 2(a) merely because it was also covered by Section 3 of the Robinson-Patman Act, stating (p. 954):

"Section 2(a) provides a civil remedy by way of triple damages while Section 3 imposes criminal penalties for some but not all of the same infractions. Section 3 is specific in its interdictions of geographic price discriminations, while Section 2(a) is broader to prohibit the same practices between different purchasers wherever located, whether competing or not, when the effect of such discrimination may substantially lessen competition or tend to create a monopoly in any line of commerce. * * *"

The Court of Appeals' analysis of the provisions takes no account of the origin and purpose of Section 3. That section was originally introduced as an alternative to the Robinson-Patman bill and was later incorporated in the final bill along with those provisions which amended Section 2 of the Clayton Act.[17] It was never regarded as a measure to fill the gaps left open by Section 2(a). On the contrary, its purposes were to enable an injured person to obtain quicker relief through local United States attorneys than was thought available through Federal Trade Commission processes and to provide, by criminal sanctions, a greater deterrent than the related provisions of the Clayton Act amendments.[18]

E. ISSUES NOT REACHED BY THE COURT OF APPEALS

Respondent's brief in opposition candidly asked this Court to consider "independent grounds not passed upon by the Court below" (Br. in Opp., p. 23), specifically its contentions that there was not adequate proof of injury to competition (*id.*, pp. 24–27),[19] and

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[17] See *Nashville Milk Co.* v. *Carnation Co.*, *supra*, 355 U.S. at 381, n. 11.

[18] See H. Rep. 2951, 74th Cong., 2d Sess., p. 8, and the statement of Representative Utterback, 80 Cong. Rec. 9419 (both quoted in *Nashville*, *supra*, 355 U.S. at 381); 80 Cong. Rec. 6348-6349 (Remarks of Senators King, Borah, and Robinson).

[19] Respondent has contended throughout the litigation that its price cutting foray in the St. Louis area was not a discrimination prohibited by Section 2(a) because there were no sales below cost and there was no purpose to destroy or eliminate competition or "any other predatory purpose" (Br. in Opp., p. 2; see also pp. 12–13, 16). Without conceding that a showing of predatory design is a prerequisite to showing an unlawful effect under Section 2(a) (see *Samuel H. Moss, Inc.* v. *F.T.C.*, 148 F. 2d 378, 155 F. 2d 1016 (C.A. 2), certiorari denied, 326 U.S. 734;

that it had in all events offered proof sufficient to bring itself within the meeting-competition-in-good-faith defense (*id.*, pp. 27–29). Also in issue in any further proceeding would be respondent's contentions (R. 73–75) that the Commission's order is inapt and of unwarranted breadth.[20] We do not seek to minimize these questions, which are part of the litigation and were briefed and argued at great length in the

Balian Ice Cream Co. v. *Arden Farms Co.*, 231 F. 2d 356, 369 (C.A. 9), certiorari denied, 350 U.S. 991; *F.T.C.* v. *Ruberoid Co.*, 343 U.S. 470, 484 (dissenting opinion)), we note that the Commission, over respondent's objections, adopted (R. 48) the examiner's findings that "these price reductions were ordered by [respondent's] president for two admitted reasons: to get business away from its competitors, and to punish them for refusing to increase prices when A.B. did so in the fall of 1953. Apparently the lesson was well taught and better learned, because those three St. Louis breweries promptly followed A.B. up with price increases in March 1955, and were careful to keep the price difference between them and it at less than the 33 cents whose elimination had cost them so much sales volume" (R. 40). This finding had basis in the evidence. Thus, respondent's president, Mr. August A. Busch, Jr., testified that "For the first time I think in the history of the brewing industry, when the large shipping brewers increased their price * * * the regionals and locals in some areas did not increase their price" (R. 934); "I imagine we wouldn't have done anything had they raised, to be perfectly frank and honest with you" (R. 935). In response to a suggestion that "the failure of Falstaff and Griesedick Bros. and Griesedick Western * * * to increase their prices after the settlement of the Milwaukee strike was the real reason for the price reduction of Budweiser in January 1954, was it not?", Mr. Busch replied, "Competitive-wise, certainly" (R. 938).

[20] Respondent's suggestion that the Commission order reflects its position that "a mere reduction of price in one area without similar reductions everywhere else constitutes, without more, a prohibited 'price discrimination'" (Br. in Opp., p. 29), misstates the Commission's conclusions. See Commission's opinion, R. 59–61.

court below. On the contrary, we point out that they require a careful evaluation of a three-volume record in the light of statutory criteria which, because of the very nature of the subject matter, are necessarily imprecise. Under settled practice, the adjudication of such difficult and complex issues should not be undertaken in the first instance by this Court without benefit of prior study and review in the lower federal courts. "When this Court determines that a Court of Appeals has applied an incorrect principle of law, wise judicial administration normally counsels remand of the cause to the Court of Appeals with instructions to reconsider the record." *O'Leary* v. *Brown-Pacific-Maxon,* 340 U.S. 504, 508.[21] The very considerations advanced in the rare instances when the Court has departed from this precept—that the record is "slim" and the relevant standard "not difficult to apply." *O'Leary* case, *supra,* at 508—argue against any departure here. The record is a heavy one and the application of Clayton and Robinson-Patman Act concepts to complex patterns of economic behavior is, by any standard, difficult and painstaking. The Court of Appeals has the primary responsibility to make the initial determination which the review procedure contemplates. It has not yet addressed itself to the issues (involving, in large part, mixed questions of

[21] The same point was expressly made in this Court's opinion in *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 497. The practice, of course, is such a regular and well-defined one that it is ordinarily followed without comment. For recent examples, see *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 175; *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U.S. 222, 229; *Black* v. *Magnolia Liquor Co.*, 355 U.S. 24, 27.

law and fact) which respondent would argue in this Court. These issues were not reached because the court below proceeded upon a basic premise which we believe erroneous. If this Court agrees that the premise of the decision below was a mistaken one, it follows, we believe, that the case should be remanded so that it may proceed in orderly and ordinary course.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the cause remanded for further proceedings.

Respectfully submitted.

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BRIEF OF ANHEUSER-BUSCH, INC.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF ANHEUSER-BUSCH, INC.

PRELIMINARY STATEMENT

The position of the Federal Trade Commission that a seller may never reduce prices in a particular market while maintaining them in other non-competing markets without having "discriminate[d] in price" under Section 2(a) of the amended Clayton Act, raises serious questions concerning the proper interpretation of that Act in the light of the mandate for competition declared by the anti-trust laws.

Indeed, this interpretation of the Act has been aptly described by a Court of Appeals as ringing "the death knell

of competition". *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F. 2d 356, 367 (9th Cir. 1955), cert. den. 350 U. S. 991. It becomes necessary "to reconcile such interpretation, except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress." *Automatic Canteen Co. v. Federal Trade Commission*, 346 U. S. 61, 74.

Prices, as this Court has noted, are "the central nervous system of the economy". *U. S. v. Socony Vacuum Oil Co.*, 310 U. S. 150, 226 n. 59. If construed as the Commission urges, Section 2(a) becomes the instrumentality of price uniformity and rigidity in open conflict with the purpose of the antitrust laws.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 1515-1522) is reported at 265 F. 2d 677 (1959). The opinion of the Federal Trade Commission (R. 49-61) is not yet officially reported.

STATUTES INVOLVED

Section 2(a) and (b) of the Clayton Act, 15 U. S. C. 13(a) and (b), as amended by the Robinson-Patman Act, 49 Stat. 1526, provides as follows:

> (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, con-

sumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Section 3 of the Robinson-Patman Act, 49 Stat. 1528, 15 U. S. C. 13a, provides in pertinent part:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, * * * to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract

to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both."

QUESTIONS PRESENTED

The question here requires some comment. The Commission, both in its question presented and in most of its brief, seeks to include as a constituent element of the statutory phrase "to discriminate in price between different purchasers", the separate and distinct statutory phrase "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly * * *"

The Court of Appeals decided that the Commission had neither charged nor shown that respondent "discriminate[d] in price" within the meaning of Section 2(a). The Court below expressly noted that it never reached the statutory question of whether the effect of such discrimination was to injure competition. 265 F. 2d 677, 680 (R. 1518).

The Commission compounds the confusion by arguing variously in its brief that a difference in price plus injury to competition amounts to a discrimination in price between different purchasers (Pet. Br. 10, 12, Petitioner's Question Presented), while arguing at other times that a mere difference in price is a discrimination in price (Pet. Br. 12, 19 fn. 11).

The Commission also confuses the question by altering the position which it took before the Court of Appeals

where it contended that a seller's mere reduction in prices in one market, while not reducing them elsewhere, constituted a discrimination in price between different purchasers.

The Commission misreads the decision of the Court of Appeals to mean that there can be a violation of Section 2(a) only where there is a difference in price between competing purchasers. In so doing, the Commission quotes or refers to all (Pet. Br. 17) the legislative history relied on by the Court below *except* the vital portion in the middle which indicates that there may be a violation involving different prices to non-competing purchasers if there is a sacrifice of some part of the seller's necessary costs and profit, as has been the situation in the prior territorial price discrimination cases.

In order to place the decision of this case in its proper perspective, we restate the question cast in its statutory and factual terms as follows:

Did respondent "discriminate in price between different purchasers" within the meaning of Section 2(a) when it reduced prices uniformly to all customers in its home market without reducing them in other markets, where

(1) There were characteristically different prices prevailing in different markets at all times in the industry;

(2) There was no complaint by the Commission concerning the existence of those different prices;

(3) There were no sales below cost or sales which sacrificed necessary profits; and

(4) There was no design or purpose to eliminate a competitor?

Moreover, the expeditious resolution of the important questions involved in this case makes it desirable that the Court consider the other bases of affirmance, argued below but not passed upon. *Ryerson* v. *United States*, 312 U. S. 405; *Letulle* v. *Scofield*, 308 U. S. 415; *Langnes* v. *Green*, 282 U. S. 531, 531-535; *Walling* v. *General Industries Co.*, 330 U. S. 545, 547. These additional questions are:

1. Did the fact that respondent maintained higher prices in markets outside St. Louis than it had inside St. Louis cause the required statutory effects upon competition among respondent's "firmly entrenched" competitors in St. Louis, when the most that is claimed is that respondent increased its sales while its competitors' sales decreased from four-fifths to two-thirds of that market?

2. Was respondent meeting an equally low price of a competitor in good faith within the meaning of the absolute defense in Section 2(b) of the statute when respondent, while seeking means to offset a widespread loss of sales, temporarily reduced its prices in its home market to prices which were always higher than or equal to those of its principal competitor, whose sales were greater than respondent's in the many markets where they competed?

STATEMENT OF THE CASE

Respondent Anheuser-Busch, Inc. (hereinafter called "AB") is the brewer of Budweiser beer.

In the beer industry, pricing is characterized at all times by different prices in different markets, reflecting differing freight rates, differing taxes imposed by States, counties and even cities, freight advantages of competitors,

competitors' advertising, recessions or other economic conditions, local costs of distribution and varying and numerous other conditions or competitive circumstances peculiar to each market (R. 19).

It was found that "all of the above distributive characteristics directly affect price and competition in any given market. * * * All of them are beyond the control of the brewers, yet the price to the consumer is controlled by them." (R. 19).

It was also expressly recognized that the beer industry is composed of "many local competitive trading areas" (R. 18), and that in the brewing industry uniform prices by a manufacturer "would be contrary to market realities." (R. 60).

Invariably, there are many beers in most markets which are sold at several different price levels. The different price levels vary from time to time and from place to place (R. 19-20). Whenever Budweiser is sold to retailers at a higher price than other beers, the amount of the difference cannot be said to be fixed by AB, since that amount and the very existence of a difference are as much dependent upon the pricing policies of the competitive beers as on AB's price. (See Appendix 1.)

AB's main plant and home office are located in St. Louis, where it distributes Budweiser directly to retailers rather than through wholesalers (R. 95, 100). AB's prices for Budweiser traditionally have been different in St. Louis than in other cities. They were different in St. Louis before 1954, during 1954, and thereafter (Comm. Exs. 5-22, R. 112, 979-996; Exs. 180-228, R. 967, printed in part at R. 1479-1491 and R. 1513).

The Commission has not challenged AB's different prices for Budweiser in St. Louis or elsewhere for the

period before 1954, or after March 1, 1955. Rather, it has noted that "respondent's prices vary in the different markets in which it sells, resulting in differences which, with the exception of the price discriminations charged in this complaint, are not in issue in this proceeding" (R. 60).

The complaint in this case charged AB with having violated Section 2(a) in having reduced prices in St. Louis County[1] on January 4, 1954, and again from June 20, 1954, until February 28, 1955, while not reducing them elsewhere (R. 5-7). The complaint noted that AB had other prices elsewhere (R. 7).

The Background of the Price Reductions in St. Louis

In St. Louis there were four substantial companies which were well entrenched over a wide area (R. 317):

(1) Falstaff Brewing Corporation operated eight breweries and distributed its beer widely in 26 states in the Midwest, South, Southeast, and West Coast. In 1954 it ranked sixth in national sales and in 1955 (after the price reductions complained of) ranked fourth (R. 25, 215-217, 930; Ex. 230, R. 969, 1493-96).

(2) Griesedieck Western Brewing Company operated two breweries, and marketed its beer in twenty states. It was purchased in 1954 by Carling Brewing Company, Inc., a subsidiary of Canadian Brewers, Ltd., which owned eighteen breweries throughout the United States and Canada (R. 25, 33, 148-49, 805).

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[1] Prices were actually reduced in St. Louis County and the City of St. Louis (hereinafter jointly referred to as St. Louis).

(3) Griesedieck Bros. Brewing Co. marketed its beer from one brewery in St. Louis into thirteen states from Illinois to Texas and from California to Indiana (R. 25).

(4) AB, whose principal brewery is located in St. Louis and who had other breweries located in Newark, New Jersey and Los Angeles, California, distributed its beer throughout the United States (R. 16).

Over the years AB has been one of the few brewers selling throughout the United States, despite freight, tax and other disadvantages in most markets (R. 16-19; Ex. 128, R. 641, 1393). While AB has ranked first or second in total national sales, it has never had more than about 7% of such sales and in no major market in the United States is it first in sales, and in most of them it is not second or third (R. 82-83).

On the other hand, AB's major regional competitors have far out-stripped it in sales in each market and their sales growth in recent years has been substantially greater than AB's (Ex. 122, R. 622, 1383; Ex. 230, R. 969, 1494-96). Some regional brewers like Falstaff have purchased plants in different areas of the country (R. 215-17, 930; Ex. 30, R. 222, 1174-75; Ex. 31, R. 222, 1179-80; Ex. 32, R. 222, 1181), thereby increasing their freight and other advantages over AB. Furthermore, AB is unable to compete effectively in advertising expenditures with such brewers in most markets, for when a brewer competes in every market and has a minor portion of the sales in each such market, it necessarily "scatters its shots" in so far as advertising in a particular market is concerned (R. 153, 156).

Thus, in 1953, Griesedieck Western had 38.9% of the St. Louis market, Falstaff 29.4%, Griesedieck Bros. 14.4%, AB 12.5%, and the balance of approximately 5% was shared by a large number of other brewers selling in that market (R. 26).

In the Fall of 1953, after an increase in costs due to a new and higher wage contract, AB increased the price of Budweiser 15 cents a case in all markets, except those in Missouri and Wisconsin (R. 929; Comm. Ex. 23, R. 113, 997).[2] This small brewery increase was multiplied by the wholesalers' and retailers' markups in many areas to an increase of 5 cents a bottle or can, or a total of $1.20 a case at the retail level (R. 157-158).

In spite of the fact that they incurred similar cost increases due to the same wage increases, Falstaff and AB's other St. Louis competitors chose to absorb the increased costs, and did not raise prices in any market in which they did business (R. 934). In many markets, this resulted in a greater difference in price between Budweiser and competitive beers, such as Falstaff. As a consequence, AB began to suffer severe sales losses in November, 1953 in the sales area supplied by the St. Louis brewery—losses as high as 73% in Nebraska, 53% in Oklahoma, 58% in Texas, etc. (R. 601, 860, 882; Ex. 3, R. 143, 1089-90). Continuing into December, 1953, industry sales were down only 8%, but AB's sales were 30% below the previous year and in some states were as much as 83% below the previous year (Ex. 4, R. 143, 1131; R. 32).

[2] The Hearing Examiner, while noting AB's general price increase, failed to note that it did not raise prices in Missouri and Wisconsin (Compare Pet. Br. 4-5 and fn. 2).

The Price Reductions and Market Tests

In an effort to help offset temporarily these losses, while experimenting with more permanent means of doing so, on January 4, 1954, AB reduced the price of Budweiser in the St. Louis market by 25¢ per case (R. 979),[3] which was still 33¢ higher than the prices of its three principal competitors in St. Louis. While this new price was in effect, AB also increased its advertising expenditures (R. 101; Ex. 119, R. 613, 1363-66), changed the organization of its sales force (R. 101, 857-53), and changed its method of solicitation and delivery of orders to the system used by all of its St. Louis competitors (R. 101, 857-58).

Despite these changes, AB's sales in St. Louis increased only moderately, but its national sales continued to decline. Sales were off more than 1,000,000 cases during May, 1954, as compared with May, 1953. In June they were off 1,500,000 cases (Ex. 14A, R. 598, 1145).

Consequently, on June 21, 1954, AB reduced the price of Budweiser in St. Louis to the same price its principal competitors had been and were then charging for their beers (R. 27, 52, 99-100). During the period that this price was in effect, AB continued its extensive surveys and tests to determine market conditions and the efficacy of various proposed courses of action in numerous sections of the country to recover lost sales volume (e.g., R. 176, 626, 803-04, 822-23). It attempted to roll back prices in certain areas where it had shortly before increased them, but with no

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[3] Unless otherwise indicated, all prices are for cases of 24 twelve ounce returnable bottles. Prices for other units also changed, but in varying amounts. All sales figures in cases represent statistical cases, i.e., the equivalent of 24 twelve ounce packages, or 288 ounces of beer, regardless of the type of container or container size (R. 195).

effect on sales (R. 176, 804). It gave intensive study to the production, merchandising, legal, tax and other problems of producing new packages for Budweiser (Ex. 155, R. 816, 1443; Ex. 156, R. 816, 1444; Ex. 127, R. 633, 1387; Ex. 162, R. 834, 1447; Ex. 163, R. 835, 1450; Ex. 170, R. 848, 1460; Ex. 173, R. 842, 1469). Finally, it made the same intensive study of the problems of producing a new brand of beer (R. 175, 843-46).

As a result, AB decided to produce a lower-priced beer, priced competitively with the beers of its principal competitors. On March 1, 1955, this new brand and formula were developed and ready to be marketed. It was a "popular priced" brand, and so as not to compete with itself, AB increased the price of Budweiser in St. Louis 45¢ per case. Later, a second popular priced brand, Busch Bavarian, using different merchandising concepts replaced the first beer, Busch Lager, and is widely distributed in the Midwest (R. 175, 851-56; Ex. 173, R. 842, 1469).

During the entire period of AB's price reductions in 1954-1955, its St. Louis competitors continued to sell in St. Louis at the same price at which they had previously sold. When AB raised its price of Budweiser 45 cents a case in March, 1955, its St. Louis competitors raised their prices 15 cents a case, thereby underselling Budweiser by 30 cents a case (R. 31).

Thus, the St. Louis reductions complained of were only one part of AB's extensive program to offset its total sales losses, while undertaking to determine the best permanent solution. The effectiveness of the price reduction part of that program could have significance to AB only if carried out in St. Louis. It is in the area served by AB's St. Louis brewery where sales losses to the regional beers

were heaviest (Ex. 3, R. 143, 1077-1130). Distribution in St. Louis is directly from AB to the retailer, so that there was no question but that its price reductions would immediately take effect in sales to retailers. Moreover, AB did not have the problem of freight costs involved in shipping to another market where a regional brewer located nearby always had a cost advantage (Ex. 128, R. 641, 1389-93). Finally, St. Louis was a large market with a good potential existing for additional growth: while AB was selling at a price above its competitors in St. Louis, its St. Louis competitors accounted for 83% of the market, and AB was in last place with between 12% and 13% of the market (Ex. 18, R. 181, 1149).

Results of the Price Reductions

A primary result of AB's June price reductions was that consumers of beer enjoyed a lower price on Budweiser since the price reduction was passed on to them by the retailers. As a result, total sales of beer in the St. Louis market increased substantially.

At all times, retailers of Budweiser in St. Louis were charged the same price for Budweiser. There is no evidence that the different prices to different purchasers caused injury to competition among any purchasers from AB. Instead, the injury to competition, required to be proved, was alleged to have occurred in competition among AB's competing sellers. However, no such competitor lost retail outlets; and each continued to sell to the same retailers to which it had always sold (R. 233; Ex. 202 K, R. 967, 1513). Each continued to sell at the same prices at which it had previously sold. Falstaff and Griesedieck Western each continued to make profits—up to $7,000,000

for the year 1954—and the record is silent on the profits of the other competitor (Ex. 32, R. 222, 1510; Ex. 46, R. 249, 1512). Each continued varying competitive activities, *e.g.*, acquiring new plants, changing the formula of its products, changing its labels, varying its advertising, etc. (R. 351-52, 365, 377, 412, 440, 454-55, 868, 915).

The facts reveal only a temporary shift in business between the competitors in the St. Louis market. AB's increase during the first price reduction was a mere 4% of the market (R. 26). Although AB did attain an average of 34.7% of sales during the eight months of the second price reduction, nevertheless it did not attain during that period a share of the St. Louis market as great as its leading competitors obtained either before or after the price reduction (Ex. 231, R. 969, 1497-98). Moreover, during the period of the second price reduction, AB merely borrowed from Falstaff the losses Griesedieck Brothers and Griesedieck Western would have had to Falstaff in any event (*ibid.*).[4] Whatever position AB attained was temporary; by 1956 it had receded to 17.5% of the market, whereas Falstaff at that time had increased to 43% of the market (*ibid.*).

Moreover, it was conceded during this proceeding that "it is quite clear that the increased sales of Anheuser-Busch in the St. Louis area allowed the respondent [AB]

[4] According to Ex. 231, Falstaff gained more than 10% of the St. Louis market between January 1954 and January 1956. Since the combined losses of Griesedieck Brothers and Griesedieck Western during the same period was approximately 15%, part of which was accounted for by "all other beers", it is apparent that Falstaff and not AB was the primary beneficiary of the switch from Griesedieck Western and Griesedieck Brothers except during the period when AB was selling at the same price as Falstaff (June 1954-February 1955).

to operate profitably within that area" (R. 1510). Further, it was expressly found that there was no proof that respondent used income or profit from the rest of its business to stabilize losses in St. Louis, or indeed that there were any losses in St. Louis during the period of the price reductions (R. 38).

The Court of Appeals Decision

In view of the fact that the Commission in its brief to this Court not only misreads the decision below but also takes different positions here than it took below, it is appropriate to determine just what the Court of Appeals was asked to hold and what it did hold.

The Commission's Order and Opinion. The Commission's Order directed that AB cease and desist

> "from discriminating, directly or indirectly, in price, between different purchasers engaged in the same line of commerce * * * by a price reduction in any market where respondent is in competition with any other seller, unless it proportionally reduces its prices everywhere for the same quantity of beer."

The Commission filed an Opinion, in support of its Order, in which it justified the Order on the ground that AB had discriminated in price by reducing its prices to all purchasers in the St. Louis market without reducing its prices elsewhere:

> "As a result of maintaining higher prices to all purchasers outside of the St. Louis area and charging the lower prices, as reduced in 1954, to only those customers in the St. Louis area, Respondent discriminated in price as between purchasers differently located." (R. 53)

Significantly, despite what the Commission now asserts with respect to the reasons for the price reductions (Pet. Br. 6, 25-6 fn. 19), the Opinion of the Commission (R. 49-61) did not assert that the lower prices in St. Louis were designed for any improper purpose (see *infra*, pp. 44-48).

Having found that AB had discriminated in price, the Commission found that, because AB increased its sales in St. Louis and its principal competitors lost sales volume, the effect of "such discrimination" was to injure competition.

Commission Proposition to the Court of Appeals. The Commission asked the Court of Appeals to hold that the mere lowering of prices in one market without lowering them elsewhere was, of itself, a discrimination in price. Its proposition was set forth in its brief before the Court of Appeals (pp. 20-21):

> "Petitioner has regularly sold its beer at different prices in the different markets of the country. These different market prices were not the subject of the Commission's complaint and are not in issue here. We are concerned only with the lowering of the price in one area while maintaining prices in all other areas, albeit the maintained prices might be different prices.
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> * * *
>
> The Commission found the price reductions confined to the St. Louis area to be price discriminations violative of Section 2(a) of the amended Clayton Act."

It did not claim or argue that AB's different prices in St. Louis were discriminatory because they were unreasonably low or below cost, designed to eliminate competitors in the St. Louis market so that AB would have that market to

itself. It did not attempt to embrace the anti-competitive features of the price reductions in the territorial price discrimination cases heretofore decided.[5] It did not cite them in support of its case, and in reply to AB's comment concerning them, rejected them (Commission Br. before the Court of Appeals, p. 35), saying:

> "In most instances the citation of these cases is clearly inapposite and certainly none of them are at odds with the Commission's reasoning or holding in this case."

In short, the Commission asked the Court of Appeals to hold that the mere reduction of prices in St. Louis (no matter for what purpose or how low) was enough to make the prices discriminatory under Section 2(a) unless AB reduced prices proportionally in all other markets.

AB's position before the Court of Appeals was:

(1) That a price reduction in one market without price reductions elsewhere was not, of itself and without more, a discrimination in price.

(2) That assuming a price discrimination was established by the mere lowering of prices in St. Louis, the price discrimination did not substantially lessen competition, and there was no reasonable probability that it would lessen competition, within the meaning of Section 2(a).

(3) That AB's prices in St. Louis were made in good faith to meet the equally low price of a competitor.

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[5] See *infra*, pp. 37-43, where these cases are discusssed in detail.

(4) That the order, which required the maintenance of "established differences" in prices among markets, was not supported by the record, and was contrary to the statutory purpose.

The Holding of the Court of Appeals. The Court of Appeals decided the case on the exact proposition presented by the Commission, quoting from the Commission's brief. It held (265 F. 2d 677) at page 682:

> "We do not find in Section 2(a) the price discrimination proscription sought by the Commission in this case."[6]

It concluded:

> "Neither by a charge in the Complaint nor by the evidence has the Commission shown a violation by AB of section 2(a) of the Act."

The Court of Appeals was of the opinion that every price difference or reduction does not constitute a discrimination in price under Section 2(a), and that price discrimination means more than a mere difference or reduction in price. It commented that inasmuch as the Commission admitted that the prices charged in the St. Louis area and in other areas were different, and that this difference was not the subject of its complaint, it was clear that the mere fact of difference in price resulting from difference of markets was not a price discrimination. It noted that the Commission complained only about the lowering of the

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[6] The Commission correctly describes the holding of the Court of Appeals decision (Pet. Br. p. 4) when it states that the Court of Appeals held "that the price reduction in St. Louis did not constitute a 'price discrimination' within the meaning of Section 2(a)." Nevertheless, it misreads the basis for the decision in the remainder of the Brief.

prices in one area while the prices in all other areas were maintained, albeit the maintained prices might be different from those charged in the area in which the lowering took place (*id.* at 680-81). It also noted that the Commission was not complaining of a price discrimination between purchasers in different markets but "rather of a lowering in price in St. Louis, whether or not discriminatory" (*id.* at 682).

Having decided that a discrimination in price was neither charged nor proved, the Court of Appeals found it unnecessary to decide the other issues presented to it (R. 1518).

The Commission's Position in this Court. The Commission in its brief to this Court by asserting the Court of Appeals' "emphasis" on certain facts and then inferring from these what it conceives to be the "thrust of the opinion" (Pet. Br. 10-11), assumes erroneously that the Court of Appeals held that Section 2(a) applies only in cases where there is a difference in price between competing customers and does not, under any circumstances, embrace geographic price reductions. In fact, the Commission claims that:

> "This case is before this Court because the Court of Appeals was of the view that there could be no discrimination within the meaning of Section 2(a), even though the price cuts 'were directed at (respondent's) local competitors,' inasmuch as respondent's customers in St. Louis were charged like prices and its customers in other areas were not in competition with the St. Louis distributors." (Pet. Br. p. 22)

This underlying assumption is patently erroneous, as can be readily seen from what the Commission asked the Court of Appeals to decide and what it in fact decided.

The Commission now has changed its position here in several respects which are inconsistent with each other:

Before the Court of Appeals it asserted that maintaining price differences between marketing areas was not a discrimination in price, but that reducing prices in one marketing area without reducing them in other marketing areas was a discrimination in price (*supra*, pp. 16-17). It now says to this Court (Pet. Br. p. 12, 19-20 fn. 11) that mere difference in price is of itself a discrimination in price.

Before the Court of Appeals it relied solely on the reduction in price in one marketing area while maintaining prices elsewhere, as the sole criterion of price discrimination (*supra*, pp. 16-17); but it says in the question it propounds to this Court (Pet. Br. 1-2) that whether or not such a reduction in price in one marketing area is a discrimination in price depends upon its effect upon competition.

SUMMARY OF ARGUMENT

This case is complicated by the Commission's failure to brief the question decided by the Court of Appeals. The Court of Appeals decided that AB's price reductions did not, on the facts of this case, constitute a discrimination in price. The Commission's brief, however, is devoted almost entirely to proving that Section 2(a) may apply to geographical price discriminations injurious to competition in the seller's line of commerce, a proposition with which we do not take issue and with which the Court of Appeals did not take issue.

AB did not "discriminate in price" by reducing its prices in St. Louis while maintaining them elsewhere. Sec-

tion 2(a) on its face requires a finding of a discrimination in price as an element separate from the effect of "such discrimination."

Inasmuch as Section 2(a) is a part of the antitrust laws, it must be construed in conformity with established antitrust policy. This Court has been faced in the past with similar instances which required the construction of other parts of Section 2 of the Clayton Act in conformity with the general purposes of the antitrust laws, and it has consistently recognized the desirability, and indeed the necessity, of so construing the law. Here the problem is to determine whether the words "to discriminate in price" are to be given a meaning which will outlaw or deter normal price differentials in different marketing areas or to be given a meaning which will permit normal pricing activities that have no antitrust significance.

The legislative history, all of the adjudicated cases, and sound economic concepts, agree that mere differences or reductions in price are not, without more, discriminations in price.

The whole legislative history of Section 2 discloses that, with respect to territorial pricing, the intention was to prohibit pricing practices designed to eliminate a competitor and create a monopoly, and not to proscribe pricing activities normal in our competitive economy. This intention is clearly established from an examination of the complete legislative history surrounding the passage of Section 2. The legislative history is clear and unequivocal that mere price differences or price reductions in non-competing markets are not sufficient to constitute a price discrimination under Section 2(a), but rather that the proscription reaches only different prices when the lower prices in one market

involve the sacrifice of some part of the seller's necessary costs and thus evidence purpose and design to engage in a pricing activity which would have antitrust significance.

The decisions in the prior territorial price cases uniformly hold that a mere price reduction or difference, even if accompanied by loss of sales by multiple competitors in a market, does not constitute "discrimination in price." In all of the cases where a price discrimination was found there was the element of sales below cost or at unreasonably low prices with a purpose or design to put a competitor out of business and thus obtain a monopoly for the seller. In the only case which has squarely raised the issue presented by this case, namely, *Balian*, the court held that the absence of those factors precluded a finding of a discrimination in price from the mere reduction or difference in price.

There being no claim made in this case that AB reduced its price in the St. Louis market below cost or unreasonably low with the purpose or design of eliminating its St. Louis competitors, the Court of Appeals correctly held that

> "Neither by a charge in the complaint nor by the evidence has the Commission shown a violation by AB of section 2(a) of the Act."

The Commission's belated suggestion that the facts in this case fall within the territorial price cases is entirely without merit. Indeed the suggestion, under these circumstances, is a virtual recognition by the Commission that Section 2(a) is limited to the type of situation disclosed in the prior territorial price cases.

In an antitrust context there are significant differences between "price reductions", "price differences" and "price discriminations." The line must be drawn to pre-

serve the competitive system. In territorial pricing cases this Court and the Courts of Appeals have held that the line is to be drawn at the point where there are not only different prices in different markets, but also where the seller has reduced his price in one market below cost or unreasonably low with the design and purpose to eliminate competition and gain monopolistic position.

The Order, which the Commission concedes may be unduly broad, is a precise reflection of the whole theory of the Complaint, and the doubts which are now expressed by the Commission concerning the validity of the Order are equally applicable to the Complaint itself.

The Commission's argument about the decision of the Court of Appeals is really not directed toward the ultimate holding of the Court, but rather to certain language in its opinion. If, as the Commission contends, the Opinion can be read to mean that Section 2(a) can only be applied in cases of differences in price between competing purchasers, then this Court need only correct such misimpressions. It would be futile to return the case to the Court of Appeals to have that Court rewrite its opinion to say the same thing.

The decision of the Court of Appeals is correct, and other bases for affirming its judgment may be invoked.

Section 2(a) requires that there be proof of injury to competition, or probable injury to competition, resulting from the alleged discrimination, before a violation of the Section may be found. The only alleged effect about which the Commission complains is a temporary loss of sales by some competitors of AB. A mere loss of sales by one competitor to another is the very essence of competition, however, and is not injury to competition within the mean-

ing of the statute. There must be something in addition to a loss of sales—some showing that the price reductions have or are likely to substantially lessen competition—before there can be a violation of Section 2(a). No such facts are presented here by the Commission. The vigor of the competition offered by AB's competitors continued at all times undiminished.

Moreover, even if injury to competition is found, under Section 2(b) it is an absolute defense if the seller's lower price was meeting the equally low price of a competitor in good faith. Here, AB's lower price "exactly matched" that of its competitors. The Commission's claim that the competitors' loss of sales show that this was "undercutting" rather than "meeting" competition is spurious. The price reduction in St. Louis was an ordinary, commercial effort by AB to increase sales and attempt to offset general sales losses, and falls completely under the protection of this Section 2(b) defense.

ARGUMENT

I

RESPONDENT DID NOT "DISCRIMINATE IN PRICE" WITHIN THE MEANING OF SECTION 2(a).

The Commission's brief is devoted to proving that Section 2(a) may apply to geographical price discriminations injurious to seller competition. But AB has never denied this, and does not deny it herein, and it does not understand that the Court of Appeals denied it.

The difficulty with the Commission's position is that the decision below, on the facts of this case, does not raise the

issue argued by the Commission. The Court of Appeals construed and applied only a single phrase of the statute—"to discriminate in price"—a phrase which is conspicuous in the Commission's brief by the scant attention given to it.

Section 2(a) of the amended Clayton Act provides in pertinent part:

> "It shall be unlawful * * * *to discriminate in price between different purchasers* of commodities of like grade and quality * * * where the effect of *such discrimination* may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of *such discrimination,* or customers of either of them." (Emphasis added.)

There are at least three elements which must be proved before a violation of the statute can be found: First, that a seller "discriminate(d) in price between different purchasers"; second, that there may be, in any line of commerce, injury to competition as defined by the statute; and third, that the injury was caused by or was the effect of "such discrimination."

The decision of the Court below turned on the question of whether AB "discriminate(d) in price" between different purchasers within the meaning of the statute. It held that in the absence of some relationship between the prices in St. Louis and in other areas and the purchasers receiving them (such as sales below necessary costs and profit, which were not found here), there was no "discrimination in price."

Notwithstanding this clear holding, the Commission's brief speaks entirely to another question—the question of the "line of commerce" in which any injury may be found

to occur. Only incidentally, while discussing this question which was expressly not passed upon by the Court of Appeals, does it even mention the issue decided by the Court of Appeals.[7] Thus, the argument by the Commission is not responsive to the decision below, and even if the Commission is entirely correct—we do not deny most of its brief—it can have no effect upon the decision. The issue remains, did AB "discriminate in price" between different purchasers within the meaning of Section 2(a) of the amended Clayton Act.

A

Section 2(a), as Part of the Antitrust Laws, Must Be Construed in Conformity With Established Antitrust Policies.

Section 2(a) is part of the antitrust laws and must be construed consistently with all of the antitrust laws. Particularly appropriate to the contention of the Commission here is the statement of this Court in *Automatic Canteen Co.* v. *F. T. C.*, 346 U. S. 61, in connection with another portion of Section 2 of the amended Clayton Act:

> "* * * § 2(f) could, if the Commission's view in this case prevails, become a major reliance for simplified enforcement of the Act not only by the Commission but by plaintiffs suing for treble damages. Such enforcement, however, might readily extend beyond the prohibitions of the Act and, in doing so, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." (p. 63)

* * *

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[7] The Commission's brief mentions the interpretation which it claims should be given the word "discriminate" in only one short paragraph (Pet. Br. 12; see also Pet. Br. 19 fn. 11, 21 fn. 13).

"* * * Although due consideration is to be accorded to administrative construction where alternative interpretation is fairly open, it is our duty to reconcile such interpretation, except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress." (p. 74)

In *Standard Oil Co.* v. *F. T. C.*, 340 U. S. 231, this Court again stated:

"The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.' *Staley Mfg. Co.* v. *Federal Trade Comm'n*, 135 F. 2d 453, 455." (p. 248)

Here, this Court has the problem of construing Section 2(a) to accord with "the heart of our national economic policy". Are the words, "to discriminate in price" to be given meaning which will outlaw or deter normal price differentials in different marketing areas resulting from various economic causes, or are they to be given a meaning which permits normal pricing activities that have no antitrust significance?

The Commission asked the Court of Appeals to hold that a mere reduction in price in St. Louis without reducing prices in other marketing areas was of itself "to discriminate in price". But reductions in price in various marketing areas are the result of normal competitive activity. Differences in price between different marketing areas are normal in most industries, reflecting not only different costs and market conditions but also active competition for business.

In fact, lack of territorial price differences and periodic reductions might be strong evidence of a lack of vigorous competition.

The Commission is trying here to plow new ground and to apply the words "to discriminate in price" in a sense that cuts across normal business activity. The Court of Appeals would have none of it.

B

Neither a Mere Reduction in Price in One Marketing Area Nor a Mere Difference in Price Between Marketing Areas is a Discrimination in Price Under Section 2(a) Unless There is Proof that the Lower Price is Below Cost or Unreasonably Low for the Purpose or Design to Eliminate Competition and Thereby Obtain a Monopoly.

In its meaning as simple English, and certainly in an antitrust context, a discrimination in price is more than a mere difference or reduction in price. This Court, without passing on the question, has indicated that "plainly enough," this is one interpretation. *Automatic Canteen Co.* v. *F. T. C.*, 346 U. S. 61, 70 n. 10. The dictionary also so indicates (Pet. Br. 12), and the Court of Appeals applied such a meaning (*ibid.*).[8]

[8] The Commission's brief seeks to apply what it calls the "primary" dictionary meaning of "discriminate," namely, "distinguish," rather than what it calls the "secondary" dictionary meaning applied by the Court below (Pet. Br. 12). In point of fact, the dictionary definition sought to be applied by the Commission is one of numerous meanings and not a *primary* one (see Explanatory Notes, Webster's New International Dictionary, 2d ed. p. xciv, #44), and stated in full is "to make a distinction; to distinguish accurately: as, to *discriminate* between fact and fancy" (p. 745), a definition inappropriate to this case. Moreover, the definition adopted by the Court below is clearly in accord with the legislative history (*infra*, pp. 31-36).

The legislative history, all the adjudicated cases, and sound economic concepts agree that mere differences or reductions in price are not, without more, discriminations in price.

This question was presented to the 9th Circuit in *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356, 367-68 (1955), cert. den. 350 U. S. 991, where the Court said:

> "It is also broadly stated in the argument that a differential in price in and of itself constitutes discrimination within the meaning of 2(a) of the Clayton Act, as amended.
>
> "But this postulate is universal, arrived at with insufficient bases. 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.' There is no presumption set up anywhere that, merely because there is a differential in various areas, necessarily a price discrimination exists. * * *
>
> "But it must be remembered that differentials are not proscribed in the language of the statute. The statute requires that there be some discrimination. * * *
>
> "But, even if discrimination be found, it is not in and of itself denounced, but only when deleterious consequences are probable, i.e., where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce. * * *"

This is the only case we find in which this question has been directly raised for decision. Here, it is raised in this Court for the first time (except as this Court denied certiorari in *Balian*).

The reasons why a discrimination in price must be more than a mere difference or reduction in price are unequivocally clear. As Corwin Edwards, former Economic Advisor of the FTC, has stated:

> "It is difficult to prevent discriminatory price reductions without unduly impairing the entire process of price competition. Reduction of prices is both one of the chief symptoms of competition and one of the foremost objectives of a competitive policy. Any concern that reduces prices probably does so principally in the hope of taking some business away from competitors. Often, however, the competitive incentive is to experiment with price reductions of limited scope rather than with general ones. Conditions of cost, of market demand, and of competitive rivalry which are encountered in the sale of different commodities, or in the sale of the same commodity in different territorial markets, are likely to be so various as to invite a policy of price differentiation. The likelihood of price variations becomes all the greater in so far as enterprises adopt a general policy of charging what the traffic will bear; for under such a policy some sales are likely to be highly profitable, while others are made for any price that more than covers direct expenses. Moreover, it may be discreet for an enterprise that is contemplating a general adjustment of prices to experiment with it at certain points before adopting it generally. Local price reductions and price reductions upon particular commodities selected from one's line of products are therefore to be expected, even though the concern instituting them is not cracking the whip over its competitors." (*Edwards, Maintaining Competition* 162 (1949))

1. The Legislative History Confirms the Holding Below that a Mere Reduction or Difference in Price Is Not a Discrimination in Price.

The Commission's brief (Pet. Br. 13-19) reviews selected portions of the legislative history to show that the original Section 2 (1914) and the Robinson-Patman amendment (1936) were intended to embrace territorial price discriminations when they had the requisite effect in the seller's line of competition. We have no quarrel with this proposition, and we do not believe the Court of Appeals had any misunderstanding of this fact, either. However, we do take issue with the attempt by the Commission to claim that the legislative history supports the proposition that all territorial price differences or reductions are, without more, "discriminations in price".

In fact, the legislative history viewed in its entirety speaks directly to the issue, speaks unwaveringly, and is not contradicted by anything we have found in the legislative history or by anything cited by the Commission. The legislative history of Section 2(a) is particularly significant here because it demonstrates that Congress clearly intended to proscribe certain unfair pricing practices designated to eliminate a competitor and had no intention whatsoever of proscribing pricing activities normal in our competitive economy.

At the time Section 2 was passed in 1914 Congress had before it the pricing practices which had been condemned in prior cases, among which was "local price cutting at points where necessary to suppress competition." The House Judiciary Committee Report (H. Rep. 627, 63d Cong., 2d Sess., pp. 8-9) stated:

> "*The necessity for legislation to prevent unfair discriminations in prices with a view of destroying competition needs little argument to sustain the wisdom of it.* In the past it has been a most common practice of great and powerful combinations engaged in commerce—notably the Standard Oil Co., and the American Tobacco Co., and others of less notoriety but of great influence—*to lower prices of their commodities, oftentimes below the cost of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made.* Every concern that engaged in this evil practice must of necessity recoup its losses in the particular communities or sections where their commodities are sold below cost or without a fair profit by raising the price of this same class of commodities above their fair market value in other sections or communities." (Emphasis added.)

This was the legislative purpose behind Section 2 of the 1914 Act. It belies any intention on the part of Congress to make every territorial price reduction or every difference in price between different marketing areas an illegal price discrimination.

The Commission's Brief (Pet. Br. 15-6) is less than candid in discussing the legislative history of Section 2 of the Clayton Act (1914) as it relates to the Commission's central proposition. It quotes only portions of the House Judiciary Committee Report out of context in an effort to sustain its proposition that any territorial price difference

or reduction amounts to discrimination in price if there is the requisite effect in the seller's line of competition.

However, it is enabled to reach this result only by conveniently omitting every reference in the report to the real intent of Congress—to prohibit only price reductions or differences, usually below cost, made with the purpose or intent to destroy competition and thereby obtaining a monopoly. In order that this Court may appreciate the extent to which the Commission has misstated the legislative history underlying the passage of the 1914 act, we are attaching as Appendix 2 the complete House Judiciary Report insofar as it deals with Section 2 of the Clayton Act. It will be noted that there are repeated references in the Report to the nature of the price differences which were being proscribed, and that there was no intent to proscribe all territorial price differences or reductions but only those which were undertaken with an intent to destroy competition and obtain a monopoly.

In the only case between 1914 and 1936 involving territorial price reductions (*Porto Rican American Tobacco Company* v. *American Tobacco Company*, 30 F. 2d 234 (2d Cir. 1929)), cert. den. 279 U. S. 858, that very pricing situation was involved, namely, selling below cost in a local market for the purpose and design of eliminating the only local competitor in that market.

The Robinson-Patman amendment to Section 2 was spurred by the Senate investigation in 1934 of chain stores and their advantageous buying power. In 1936 Congress undertook to strengthen Section 2 by eliminating the advantages which the chain stores had and also to proscribe certain types of brokerage, advertising allowances, and

other advantages which the large buyers, particularly the chain stores, enjoyed.

But the underlying purpose of Section 2, as a law proscribing recognized unfair competitive pricing practices, was not changed. In fact, the House Committee on the Judiciary (H. Rep. 2287, 74th Cong., 2d Sess., 1936) stated:

> "It is the design and intent of this bill to strengthen existing anti-trust laws, prevent unfair price discriminations, and preserve competition in interstate commerce * * *."
>
> "There is nothing in it to penalize, shackle, or discourage efficiency, or to reward inefficiency. There is nothing in it to fix prices, or enable the fixation of prices; nor to limit the freedom of price movements in response to changing market conditions." (p. 17)

As stated by Congressman Utterback, manager of the Conference Bill that became Section 2(a) of the Robinson-Patman Act:

> "In its meaning as simple English a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other. If the two are competing in the resale of the goods concerned, that relationship exists. Where, also, the price to one is so low as to involve a sacrifice of some part of the seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers; and there, too, a relationship may exist upon which to base the charge of discrimination. But

where no such relationship exists, where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale to different customers at those different prices would not constitute a discrimination within the meaning of this bill." (80 Cong. Rec. 9416)

The Commission construes the decision below as holding that "Section 2(a) only reaches differential pricing which is shown to cause injury to competition among buyers" (Pet. Br. 8). The Commission reaches this conclusion only by ignoring the complete text of the legislative history cited by the Court. Congressman Utterback insisted upon the existence of "some relationship" in order for a difference to be actionable as a discrimination. To be sure, he said that if two purchasers are competing in the resale of the goods concerned, that relationship exists. But he also said, in a contiguous phrase, again conveniently omitted in the Commission's Brief (p. 17):

> "Where, also, the price to one [buyer] is so low as to involve a sacrifice of some part of the seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers; and there, too, a relationship may exist upon which to base the charge of discrimination." (Material in brackets added.)

The relationship so described plainly is not limited to having its effects felt in competition among buyers. There is no reason to believe that Congressman Utterback did not intend them to be applicable to sellers, since he plainly understood the problems of some territorial pricing, as the Commission makes clear (Pet. Br. 18). Moreover, con-

temporaneous commentaries understood his remarks to have this effect, 50 Harv. L. Rev. 106, fn. 9 (1936).[9]

Significantly, there is no legislative history contrary to the above quoted statement by Congressman Utterback. Other remarks by Congressman Utterback, cited by the Commission, which it claims are contradictory (Pet. Br. 18), are completely consistent with his prior statement. In them, he asserted the application of the Act when "discriminatory prices" are utilized to destroy a sole competitor. However, the quotation does not refer to the question of what constitutes a discriminatory price, which is the issue actually posed by the decision of the Court of Appeals. Rather, the remark is directed to another statutory requirement, namely, the necessary effect on competition.

The Commission cannot deny that the legislative history cited by the Court below is a proper interpretation of the term "discriminate in price". It is the only applicable legislative history, and it clearly demonstrates that Congressman Utterback had in mind both secondary and primary line cases. He clearly referred to seller competition when he mentioned the creation of the relationship by sales below the seller's necessary costs and profit.

Thus, the legislative history shows that Section 2(a) was enacted to correct certain pricing practices which have been found to be against public policy, because inimical to free competition, but at the same time not to outlaw territorial price differences which resulted from normal competition in a legitimate activity for gain.

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[9] The secondary authorities which the Commission cites in the footnotes to its brief (p. 18) as having criticized the Utterback definition of discrimination for ignoring the seller's line of competition have overlooked this and made no mention of this analysis.

2. *Prior Decisions Uniformly Hold that a Mere Price Reduction or Difference Does Not Constitute a Discrimination in Price.*

No court has ever suggested that a mere price reduction in one marketing area while maintaining prices in other areas is of itself "to discriminate in price" under Section 2(a). All of the territorial price cases in which violation has been found involve situations where the seller reduced his price in one market, usually below cost, to drive out the competitor and obtain a monopoly. Such a pricing activity has antitrust significance. But a mere price reduction in one market, while maintaining prices in other areas, has in and of itself no antitrust significance.

In discussing these cases (Pet. Br. 19-22), the Commission persists in its erroneous assumption that the Court of Appeals held that Section 2(a) only embraced differences in price to competing customers and did not embrace territorial price differences involving reductions below cost with an intent to eliminate competition where the effect would be felt in the seller's line of commerce. We repeat that the Court of Appeals did not so hold, for it recognized the below cost-intent to destroy competition type of possible discriminatory situation in quoting Congressman Utterback. However, the Commission did not, either in its Opinion or its brief to that Court, make any claim that AB's lower prices in St. Louis were below cost or unreasonably low for the purpose of eliminating a competitor. In short, the Commission did not try to bring itself within the scope of those cases.

However, the territorial price cases are enlightening on the question when and under what circumstances a price

reduction in a local market becomes a price discrimination within the scope of Section 2(a) and when it is not discriminatory but consistent with free competition.

The common thread through all of these cases is the purpose and intent of eliminating a competitor by pricing below cost, and thus to gain a monopoly of the market. There is not the slightest suggestion in any of them that a mere reduction in price or a mere difference in price is, standing alone, discriminatory. In each case the paramount factor was the design to eliminate a competitor.

In the first of these cases—*Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234 (2d Cir. 1929), cert. den. 279 U. S. 858, the Court of Appeals found there was "sufficient evidence of a design and plan" to put a competitor out of business by selling substantially below cost (pp. 236-37). There was a clear anti-competitive purpose in the seller's price reduction, in line with the unequivocal legislative history.

In *E. B. Muller & Co.* v. *F. T. C.*, 142 F. 2d 511 (6th Cir. 1944), the Court of Appeals specifically adverted to a Commission finding that the seller sold below cost (pp. 516-518), and the evident determination to destroy the sole competitor's business. One of the seller's intercompany letters said "by continuing our efforts and putting a crimp into him wherever possible, we may ultimately curb this competition if we shall not succeed in eliminating it entirely." (p. 517)

In *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115, this Court said that the destruction of competition was plainly established and the evidence ample to support a

finding of a purpose to eliminate a competitor. This Court said, p. 120:

> "*This type* of price cutting was held to be 'foreign to any legitimate commercial competition' even prior to the Robinson-Patman Act." (Emphasis supplied.)

The type of price cutting in *Moore* did not embrace all price reductions, but only those designed to eliminate a competitor.

In *Maryland Baking Co.* v. *F. T. C.*, 243 F. 2d 716 (4th Cir. 1957) there was again a demonstrated purpose to eliminate the sole competitor in the area of the price reduction, and that the price reduction "was initiated for the purpose of driving the competitor out of business." (id. at 718; see 52 F. T. C. at 1687)

The court in *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356 (9th Cir. 1955), cert. den. 350 U. S. 991, a suit for damages by competitors based upon a loss of volume and profit by them, pointed out the distinction between price reductions which were condemned by Section 2(a) and those which were not. It said:

> "Arden did not embark upon a campaign by selling goods shipped in interstate commerce at a loss in a local area to punish or designedly cause loss to one weaker competitor. It had no design to eliminate such a competitor and put him out of business by giving guarantees against loss to its own sales customers." (p. 368)

It specifically found, therefore, that *Porto Rico* and *Moore* did not apply and that a mere lowering of the price in one market to increase or to retain business without the anti-

competitive features of *Porto Rico* and *Moore* was not a price discrimination, regardless of any effect on competition.

In *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950 (10th Cir. 1959), pet. for cert. filed October 13, 1959, the court also viewed the case as that of a local price reduction designed to eliminate or cripple a competitor, saying:

> "Anti-trust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise. But as a necessary incident thereto it is concerned with predatory price cutting, which has the effect of eliminating or crippling a competitor. For, surely there is no more effective means of lessening competition or creating monopolies than the debilitation of a competitor." (p. 954)

The 10th Circuit misread, as does the Commission, the lower court's holding to mean that there can be no price discrimination except in connection with differing prices to competing purchasers. But, as we have shown, that is not the real holding of the court below.

This review of the only territorial price discrimination cases [10] clearly illustrates the fine line which must be drawn in construing Section 2(a), and in deciding when differences in price or the lowering of prices become discriminatory and when they do not, so as to avoid destroying the very competition which the antitrust laws seek to protect.

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[10] *Samuel H. Moss, Inc.* v. *FTC*, 148 F. 2d 378, 155 F. 2d 1016 (2d Cir. 1945), cert. den. 326 U. S. 724, did not involve territorial price discrimination as claimed by the Commission (Pet. Br. 19). Moreover, the question of the meaning of the term "to discriminate in price" was neither briefed nor discussed in the opinion. Cases like *FTC* v. *Morton Salt*, 334 U. S. 37 and other cases cited by petitioner (Pet. Br. 19-20 fn. 11) do not bear on this problem, since none of them raise the issue.

The suggestion in the Commission's brief (Pet. Br. 22) that the language in *Porto Rican, E. B. Muller, Moore* v. *Mead, Maryland Baking,* and *Atlas Building Products Co., supra,* relating to purpose or design to destroy a competitor's business, is wholly referable to the effect and not to the question of whether there was a discriminatory price, is simply a continuation of its confusion. Obviously, the purpose and design that can make a reduction in price discriminatory is something quite different from the effect which under Section 2(a), must flow from that price discrimination. The same is true with respect to sales below cost with a purpose or design to destroy competition.

Despite the clear rationale of the adjudicated territorial price cases, as well as the legislative history, the Commission in its brief to this Court maintains that the words "to discriminate in price" must be construed in conjunction with effect on competition as though the reduction of the price in one marketing area while maintaining prices in other marketing areas is or is not a "discrimination in price", depending upon the effect on competition. This was not the Commission's position before the Court of Appeals, but it is equally fallacious.

The very ~~framework~~ of Section 2(a) shows that the discrimination in price and the effect of such discrimination are two separate statutory elements necessary to constitute a violation. The plain language itself says that there must be a "discrimination in price" before the effect of "such discrimination" becomes pertinent. It is well known that normal competitive activity often results in loss of sales by competitors. Yet that is the normal result of vigorous competition. The low-cost producer, the better salesmen, the more imaginative or better financed adver-

tising program, the prompter attention to deliveries and many other normal business events, can and do cause loss of sales by competitors. So the Commission's attempt to define "discriminate in price" by means of looking to the effect, in terms of loss of sales and equating such loss of sales with injury to competition, is fallacious because the same effects may result from normal non-price competitive activities as from lower prices. It would be ironic if it should be the rule that competition on prices, which this Court has recognized "is crystal clear * * * the rule of Congressional purpose",[11] should be more restricted by law than non-price forms of competition, which are often not as beneficial to the consuming public.

Judge Yankwich recognized this concept of competition in *Balian* when he stated:

> "It is of the essence of competition that it must, of necessity, injure others. For, as a three-judge court once wrote:
>
> > " 'Competition is, in its very essence, a contest for trade.'
>
> "In such contest, differences in (a) the quality of goods offered, and (b) their prices are accepted means of competition. Reputable concerns constantly advertise 'We will not be knowingly undersold.' And no case exists in which the courts have held that a price reduction, in itself, not having as its purpose the destruction of a competitor or the monopolization of trade or commerce, but made to meet competition in the field or to retain trade or custom or to gain new custom, is *illegal as such*."

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[11] *United States v. Line Material Company*, 333 U. S. 287, 309.

Balian Ice Cream Co. v. *Arden Farms Co.*, 104 F. Supp. 796, 801 (S. D. Calif. 1952), aff. 231 F. 2d 356 (9th Cir. 1955), cert. denied 350 U. S. 991. (Original emphasis.)

Thus the words "discriminate in price" are words of art, not to be construed out of context. They mean something other than a mere reduction in price in one area or a mere difference in price between marketing areas. Moreover, they are not dependent for interpretation on whether or not competitors have lost sales.

If the rule were that a mere difference in price constitutes a discrimination within the meaning of the statute, then, many manufacturers selling in more than one marketing area would be at the mercy of consumer reaction as to whether they would be in violation of the law. If consumers decide to buy more of their products in an area where, for any one of a number of legitimate economic reasons, the manufacturer has a lower price, then he is violating Section 2(a) under the Commission's theory of injury. The inevitable tendency would be for sellers to have uniform prices—at the highest level. It is difficult to envisage how the public interest would be served by such a result. Then Section 2(a) has become a price-fixing law inconsistent with the overall antitrust policy of protecting free competition.

Under the Commission's construction, every reduction in price in a particular market and every difference in price in different markets becomes suspect. No seller could risk reducing his price in any marketing area to increase his business, or to offset business losses elsewhere, because if he got more business in the area of the price reduction

(as did AB here) he could never be sure that the Commission would not conclude (as did the Commission here) that the effect of the price reduction "may be" to substantially lessen or injure competition with his competitors. Presumably the more business he obtained, the more vulnerable he would be. How much business could the seller safely obtain by reducing his price? The Commission in this case says that 35% of the market (increased over 12%) is too much. Would 25% of the market have been satisfactory? Would 15% be satisfactory? Of course, a seller reducing his price to get more business seldom knows whether he is going to be successful or how successful or what the ultimate effect will be on the ability of his competitors to compete.

In any realistic view of the Commission's proposition, Section 2(a) would become a compelling deterrent to, if not an actual proscription of, active price competition—and price competition is the very essence of competition itself.

Application of Territorial Price Cases to This Case

The doctrine of the territorial price cases, as a development of the legislative history, is that a discrimination in price depends upon a finding that prices have been reduced below cost or unreasonably low with the purpose and design of eliminating a competitor and creating a monopoly for the seller. The doctrine of those cases and the legislative history demonstrate, as determined by the Court of Appeals, that AB did not discriminate in price here.

Nowhere in the Opinion of the Commission is there any reference to any sales below cost or at unreasonably low

prices for the purpose or design of eliminating a competitor, as justifying the finding of discrimination. Neither the question presented to the Court of Appeals nor the Commission's brief and argument to that court rested the case on any such proposition. In fact, the Commission in its brief to the Court of Appeals said the territorial price cases were "inapposite" and AB's brief distinguished them. Nor is any such proposition comprehended in the question presented by the Commission to this Court.

While the Commission did not find that AB's price reductions were made for the purpose of destroying or eliminating any competitor in St. Louis, the Commission nevertheless asserts in its brief that the reasons for the price reductions were "to get business away from its competitors, and to punish them for refusing to increase prices when respondent did so in the fall of 1953" (Pet. Br. 6). The first ascribed reason is merely another way of stating that AB's purpose was to attempt to obtain more business which indeed it was and is certainly not predatory in any sense.

The second ascribed reason—the alleged punishment of competitors—is clearly erroneous. The Examiner assumed that AB had raised its prices in St. Louis when it raised them elsewhere in the United States in November, 1953. The Examiner found, based upon this erroneous assumption, that AB's reductions were to punish its competitors and teach them a lesson for failure to increase their prices *inside* St. Louis when AB allegedly increased its prices *inside* St. Louis in the Fall of 1953.[12]

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[12] The Examiner's erroneous version of the facts was that AB raised prices in St. Louis in October 1953, at the same time it raised prices elsewhere in the United States, and that this price increase

On appeal, AB showed the Commission that the basis of the finding by the Examiner was in error since AB had not raised its prices in St. Louis and hence there was no "lesson" to be "taught" to, or "learned" by, the St. Louis competitors, as found by the Examiner. Moreover, Commission counsel before the Commission conceded that the Examiner's assumption was in error saying in answer to a question by Commissioner Secrest "In St. Louis, you see, Budweiser never did increase its prices" (R. 1514). Accordingly, the Commission Opinion (R. 49-61) completely omitted any reference to any alleged "punitive" or "retaliatory" motive.

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widened the previous differential in St. Louis to 58 cents. Thus, in the Initial Decision, the Examiner stated:

> "Although AB was not struck, it, too, signed a wage-increase contract, and, as a result, on October 1, 1953 it and its Milwaukee 'national beer' shipping competitors increased prices generally in varying amounts depending upon locality. The three St. Louis brewer competitors of AB—Falstaff Brewing Corporation (hereinafter referred to as Falstaff), Griesedieck Western Brewing Company (hereinafter referred to as G. W.) and Griesedieck Brothers Brewing Company (hereinafter referred to as G. B.) did not follow this raise in prices or make any increase in prices, continuing to sell in the St. Louis market (St. Louis and St. Louis County) at $2.35 per 24, 12-oz. case of bottles, although many other regional and local brewers in other sections of the United States did so." (R. 21-22)

Again, in Paragraph 27, the Examiner stated:

> "Secondly, these price reductions were ordered by its president for two admitted reasons: to get business away from its competitors, and to punish them for refusing to increase prices when AB did so in the fall of 1953. *Apparently the lesson was well taught and better learned, because those three St. Louis breweries promptly followed AB up with price increases in March 1955, and were careful to keep the price difference between them and it at less than the 33 cents whose elimination had cost them so much sales volume.*" (R. 40)

Although it is conceded in the brief (Pet. Br. 26 fn. 19) that AB objected to the Examiner's finding with respect to punishment, the forepart of the brief (Pet. Br. 3-6) is studiously phrased to create the impression that the Commission adopted the finding, even though it did not comment on it in its Opinion. It does so by describing the Opinion as "setting forth the grounds for its adoption of the *contested* aspects of the examiner's decision" (Pet. Br. 3) (emphasis added). But the punishment finding of the Examiner was "not contested" only in the sense that Commission counsel conceded before the Commission that the Examiner had been in error.[13]

Before the Court of Appeals the Commission claimed the punishment finding of the Examiner was adopted specifically in the Opinion of the Commission, citing language of the Opinion which actually referred to an entirely different matter (Commission Br. before the Court of Appeals, p. 41). Here, petitioner does not claim the punishment finding was adopted by the Commission Opinion, but seeks to validate it with a citation to a sentence in the Commission's Order (R. 48) which, properly interpreted[14]

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[13] Petitioner also attempts to obscure the Examiner's misunderstanding of the crucial fact which demonstrated the erroneous nature of his punishment finding, namely, his assumption that AB had raised prices in November 1953 in St. Louis when it raised elsewhere. Although petitioner states (Pet. Br. 4) that "the essential facts * * * found by the Examiner * * * are as follows:", there is no statement to show that the Examiner had found AB had not increased prices in St. Louis. Instead, this information is buried in a footnote on the following page (Pet. Br. 5 fn. 2). However, it is not stated in the footnote that the Examiner failed to make this finding but rather it is implied from the context that he did have a correct understanding of the facts.

[14] The pertinent part of the Final Order (R. 48) reads: "It Is Further Ordered that the findings, conclusions, and order, as modi-

does not constitute an adoption of it. In any event, it would be incongruous to conclude that the Commission by the cryptic sentence in its Order adopted a concededly erroneous finding of the Examiner, in the face of the complete silence of its Opinion on the matter, and the concession before it of the Examiner's misunderstanding.

Thus, the Commission has never found that AB in its price reductions had any purpose other than to increase its business in St. Louis in order to offset losses being suffered elsewhere. Moreover, for all that the Commission found, it is readily apparent that AB was not selling below cost or at unreasonably low prices for the purpose or design of eliminating any competitor in the St. Louis market and obtaining a monopoly.

Consequently, the suggestion made in the Commission's brief, in a backhanded, halfhearted manner, that the facts of this case may fall within the doctrine of the territorial price discrimination cases is entirely without merit.

Nonetheless, the fact that the suggestion is made at all indicates, we submit, an agreement in principle by petitioner with our reading of the cases. Otherwise, what purpose would be served by striving to find at this late date a predatory purpose where none was found by the Commission?

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fied, contained in the Initial Decision, be, and hereby are, adopted as those of the Commission". Under the proper rules of grammar the parenthetical phrase "as modified" applies to all which precedes it and not merely the preceding word as apparently contended by the Commission. If the words "as modified" had been intended to apply only to the preceding word "order" the phrase "as modified" would not have been set off from the word "order" by a comma.

3. *Sound Economic Concepts Require a Distinction Between Price Reductions, Price Differences and Price Discriminations.*

In the course of this territorial price case over the last five years, the Commission has taken many inconsistent positions, to evade the argument bearing down upon it at the time. In doing so, the Commission has repeatedly confused "price reductions", "price differences" and "price discriminations" and has considered them synonymous. In an antitrust context they are not synonymous, and an understanding of this point will help to clarify the problem here.

Suppose, for example, a manufacturer sells his products at $2.50 throughout the United States, except in Washington, D. C., where he sells it for $3.00. The manufacturer decides he would like to increase his sales in Washington, D. C., and that the way to do this is to reduce his price there. Accordingly, he lowers his price in the District of Columbia to $2.50. As a result, his price is now uniformly $2.50 everywhere in the United States. There has been a reduction in price in one market while prices in all other areas have been maintained; but on the Commission's own theory, there has been no discrimination, since prices are uniform. If the manufacturer's prices were originally $2.50, $3.00 and $3.50 in different markets, and he reduced prices to $2.50 in all markets, there would still be no discrimination, even though there had been non-proportionate reductions.

As another example, suppose a manufacturer has uniform prices throughout the country. He wishes to know what effect a price reduction will have on his sales. Reductions in two or three test markets will provide him with

a satisfactory answer, but he is afraid that if ~~his~~ sales increase, his competitors or the Commission will claim that he has injured competition and will proceed against him. He, therefore, reduces prices uniformly. There has been a reduction in price, but the prices which were uniform before are still uniform, and there can be no discrimination. If the manufacturer's test is unsuccessful and sales have not increased commensurate with the reduced price, he has foregone profits in not just selected markets, but universally, to his great detriment. On the other hand, if the manufacturer's test is successful, he has "injured competition", not in one or two markets, but in many or all markets, on the Commission's novel theory adopted in this case (see *infra*, p. 69) that one competitor's gain in sales and other competitors' losses in sales equal injury to competition.

Again, suppose that a manufacturer has uniform prices throughout the country. He wishes to increase his profits and to test the effect thereon of a price increase. Instead of raising his prices uniformly, however, he raises them in selected markets. As a result, he now has different prices in different markets, and on the assumption that a difference is a discrimination, the manufacturer has discriminated in price. But there has been no reduction in price, but rather price increases. If his sales in some markets where he has not changed prices should happen to increase then he may be subject to an action by his competitors or the Commission if the Commission's theory here is sound.

Now suppose, as here, a manufacturer traditionally in accordance with the custom in the industry has different prices in various markets in the country, some higher

and some lower for various reasons outlined above (*supra*, pp. 6-7). He chooses to reduce a price in a given market in an attempt to increase sales without similarly changing prices in all other markets. Here, the "price reduction" did not result in a "price difference", as there was already a "price difference".

Quite obviously, there is an area of overlap between a "price reduction" or "price difference" and a "price discrimination," as when a seller who has higher prices elsewhere reduces them in one market below cost or unreasonably low for the purpose or design to drive a competitor out of business as in *Porto Rican-American Tobacco Co.* and *Moore* v. *Mead's Fine Bread Co.* and the other territorial price cases discussed above. Nevertheless, the distinction between "price reduction", "price difference" and "price discrimination" has significance. It demonstrates that "price reductions" and "price differences" are quite distinct from "price discriminations". It emphasizes that Section 2(a) is concerned solely with "price discriminations" and that "price reductions" or "price differences" can, in territorial price cases, fall within that classification only if certain other circumstances are present.

In this connection, as the Court of Appeals recognized, it is most significant that the Commission's emphasis throughout this case has been on AB's reductions in price. Its complaint charged, in substance, that AB reduced its prices in St. Louis without lowering them elsewhere, although it noted that there were other prices elsewhere (R. 5-8). The order entered by the Commission, allegedly "to prevent disproportionate *price reductions* or *discriminations in price*" (R. 61) would prohibit AB from making

"a price *reduction* in any market unless it proportionally reduces its prices everywhere" (R. 47-48);[15] and the Commission stated to the Court of Appeals:

> "We are concerned only with the lowering of the prices in one area while maintaining prices in all other areas, albeit the maintained prices might be different prices." (Opinion of the Court of Appeals, R. 1518)

Thus, the Commission in effect told the Court of Appeals that it was not concerned with differences among markets at all; it recognized that prices outside St. Louis were different from prices inside St. Louis, but considered it legally significant that such prices were maintained rather than that such prices were either higher or different than in St. Louis.

The Court of Appeals was confronted below with a completely novel claim by the Commission—one not found in any other reported territorial price case except *Balian*, where it was rejected. It is that novel Commission position which led the Court of Appeals to conclude that "in reality, the Commission is not complaining of a price discrimination between purchasers in different markets, but rather of a lowering in price in St. Louis, whether or not discriminatory" (265 F. 2d at p. 682), and that the Commission was trying to bring within Section 2(a) of the

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[15] The petition for certiorari has recognized that the order poses a serious question as to its possible "undue breadth." (Pet. for Cert. 13) but sought to divorce consideration of it from its question presented. As we show *infra*, pp. 54-55, it is truly an absurd order. Since the order is a precise reflection of the Commission's theory of the case, as stated in its opinion (R. 50, 53), the defects in the order cannot be so glibly divorced from the unsoundness of the whole theory of the case.

amended Clayton Act a concept covered, if at all, by part of Section 3 of the Robinson-Patman Act.[16]

Accepting the Commission's thesis, the Court of Appeals recognized that the Commission was complaining of a competitive effect which could have flowed from AB's St. Louis price reductions whether or not respondent's prices had been similarly lowered in all marketing areas.

Consequently, the Court of Appeals volunteered the further suggestion that the Commission was concerning itself with a practice covered by Section 3 of the Robinson-Patman Act, which was applicable to lower prices in individual markets whether or not lowered elsewhere, i.e., to either "lower" prices or "unreasonably low prices", each for the "purpose of destroying competition or eliminating a competitor".

In any event, we cannot perceive how the Commission advances its cause by an argument based upon the Court of Appeals' interpretation of the relationship between Section 2(a) and Section 3, when there is a clear holding that the Commission has not proved, under Section 2(a), that there has been a discrimination in price. The Court of Appeals correctly noted that a discrimination in price is more than a mere difference in price, and the Commission had not shown more than a mere difference.

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[16] It is perfectly clear that the last prohibition of Section 3, i.e., "to sell * * * at unreasonably low prices for the purpose of destroying competition or eliminating a competitor", is not dependent in any way upon there being a discrimination in price, either between different purchasers or between different markets, let alone a difference in price between either of them. Otherwise stated, the last prohibition of Section 3 does not embrace any concept of discrimination in price. The Court of Appeals was undoubtedly referring to this fact. The Court of Appeals, in citing *Nashville Milk Co. v. Carnation Co.*, 355 U. S. 373, recognized the overlap between Section 2(a) and Section 3, but was referring to part of Section 3 that does not overlap Section 2(a).

C

The Commission's Order Demonstrates the Irvalidity of the Commission's Theory of the Case.

The Commission's order for the correction of the supposed violation of Section 2(a) by AB demonstrates graphically the basic fallacies in the theory underlying the entire proceeding.

The order provides that AB shall not reduce its price

> "in any market where respondent [AB] is in competition with any other seller, unless it proportionally reduces its prices everywhere." (R. 47)

Since AB is in competition with one or more brewers in *all* markets of the United States, the effect is to prohibit a reduction in any market unless it makes a proportionate reduction in all markets.[17] The reason behind this unusual order was stated by the Commission in its Opinion:

> "[I]f the order was worded so as to require respondent to maintain uniform prices this, if anything, would be contrary to market realities. Respondent's prices vary in the different markets in which it sells, resulting in differences which, with the exception of the price discriminations charged in the complaint, are not in issue in this proceeding. This order, while in effect permitting the continuation of these price differences, serves to prevent disproportionate price reductions or discriminations in prices beyond the *established difference* among markets, such as the price discriminations found to be unlawful." (R. 60-61) (Emphasis added.)

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[17] Subject, of course, to certain statutory exceptions which are presumed to be implicit in every order but which have in effect been rendered unavailable to AB by the Commission in this case.

The Commission now apparently concedes that the Order has a possible undue breadth (Pet. for Cert. 13) and does "not seek to minimize" the contention that "the Commission's Order is inapt and of unwarranted breadth" (Pet. Br. 26). This concession is extremely interesting because it apparently recognizes that the Order would have anti-competitive consequences. The Order would forever preclude AB from changing any particular price in any market unless its prices were similarly changed in all markets. It would also perpetuate AB's particular price differences between markets existing as of a given date, regardless of the continuance of the economic and competitive reasons which prompted such differences originally.

If this rule is applied to all of industry, it can readily be perceived that the opportunity for price competition is completely nullified. Changes dictated by alterations in commercial demand, available supply of goods, and all other elements, of which price is the catalyst, would be impossible. These must be the reasons, then, that petitioner now expresses grave doubts about the Order.

However, the same results flow from adoption of the concept behind the Order, namely, that a mere reduction in price may, without more, constitute a discrimination in price. Both the Order and the concept back of the Order have the same basic fault, i.e., the suppression of normal price competition which has no antitrust significance.

II

THERE ARE ADDITIONAL GROUNDS FOR AFFIRMANCE WHICH SHOULD BE CONSIDERED BY THIS COURT

It is a well settled rule that in a review of judicial proceedings by this Court the decision below must be affirmed if it is correct, even though the lower Court relied upon a wrong ground or gave a wrong reason. *United States v. American Railway Express Co.*, 265 U.S. 425; *Helvering v. Gowan*, 302 U.S. 238; *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185; *Ryerson v. U. S.*, 312 U.S. 405; *Letulle v. Scofield*, 308 U.S. 415, rehearing denied 309 U.S. 694.

There are two substantial factual reasons why this general rule should be applied in this case.

First, the existence of this Commission decision and the wide publicity which has been given to it is a clog on price competition until the issue is decided. The understanding in the business community is that there are risks involved in lowering prices on a selective market basis if there is any resultant increase in sales by the manufacturer lowering prices and decrease in sales by his competitors. If this particular theory of the Commission is not sound, and we submit it is not, then it is in the public interest that the business community be advised of that fact as soon as possible.

Secondly, the Commission has instituted numerous cases since the date of its decision in this case in a number of different industries, all based upon the same theory.[18]

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[18] E.g., *Matter of The Borden Co.*, FTC Dkt. No. 7474; *Matter of Foremost Dairies, Inc.*, FTC Dkt. No. 7475; *Matter of Pure Oil Co.*, FTC Dkt. No. 6640; *Matter of Sun Oil Co.*, FTC Dkt. No. 6641

It is obvious that if the Commission's theory is unsound, it is to the interest not only of the public, but of the Commission and the Federal Courts, to know that now rather than sometime later, to conserve judicial and administrative energies which could be better utilized in other fields.[19]

A

There Was No Injury to Competition Within the Meaning of Section 2(a).

Section 2(a) provides that it shall be unlawful to discriminate in price "*where the effect of such discrimination*" on competition is as set forth therein. The very terms of the statute make it clear that proof of injury, or reasonable probability of injury, to competition is required before there can be a finding of violation.

In *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, this Court ruled that in secondary line cases—that is, cases involving alleged injury among customers of the same seller—the burden of showing statutory injury to competition was met by evidence that some customers of a seller had been charged a substantially higher price for goods of like grade and quality than other customers in competition with them.

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[19] The cases cited by the Commission (*O'Leary v. Brown-Pacific-Maxon*, 340 U. S. 504 and *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474) were based upon the proposition that the Court of Appeals had applied an incorrect principle of the scope of review to which an administrative order was entitled, and they were remanded in order to permit the Court of Appeals to apply the correct scope of review to the administrative order. However, those holdings have nothing to do with the situation posed here where it is not contended that the Court of Appeals exercised an improper review function, but rather that it improperly decided a substantive question of law.

This rule, however, is not applicable to primary-line cases—that is, cases involving competitors of the seller rather than of the buyer. In its *Statement of Policy Toward Geographic Pricing Practices*, 1 CCH, Trade Regulation Reporter ¶3601.35 (10th ed.) the Commission explained the distinction:

> "[T]here are strong reasons why the concept of injury adopted by the court in the *Morton Salt* case should not be applied automatically to discriminations arising under geographic pricing systems in which purchasers paying different prices are differently located and the price differences generally diminish as the distances diminish between purchasers' locations. In these circumstances competition between purchasers paying significantly different prices may occur in quite limited areas or only along the fringes of trade territories. Seeming advantages in price may be materially affected by disadvantages of location. These and other considerations make it clear that in geographical price discriminations inferences of injury to competition drawn merely from the existence of price differences between purchasers who compete in some degree would have no sound basis. The minimum determination of injury should be based upon ascertained facts that afford substantial probability that the discriminations, if continued, will result in injury to competition."

A significant difference between competition in the seller's, or *primary*, line of commerce and competition in the buyer's, or *secondary*, line of commerce supports the distinction drawn in the quotation above. In the seller's line, the manufacturers have within their control factors which buyers frequently cannot control—the quality of

the product, its packaging, its place of manufacture, its method of distribution, its advertising, promotional services, and so forth. The buyer, however [*e.g.*, the retailer of beer or of salt], is more limited in what he can offer as an inducement to consumers to buy from him—particularly when he sells a pre-packaged, branded product manufactured by another. He can offer personal services, convenience, sometimes credit, but he cannot change the product, its cost of production, or the other factors which are within the province of the manufacturer. The buyer does not have as many alternatives to promote his sales and compete with other retailers paying a lower price. His resale price is a primary means of competition for him, and his costs are therefore vital.

The competing seller, however, has a wide range of alternatives to meet a competitor's lower price. In fact, a manufacturer may frequently be required to lower its price in order to meet some of these other non-price changes by his competitors which he can not match, *e.g.*, a competitor's product change may help the competitor's sales, but it would not be practicable for all brewers to change their products, if they could. And advertising alone will often not overcome the competitor's advantage (R. 607-11, 624, 803, 858). It follows that a virtual *per se* violation may properly follow from a difference in prices to competing buyers, but that as to competing sellers a *per se* rule of liability would not serve to promote competition but, indeed, would severely curtail it.

1. *The Requisite Injury Must Be Substantial Injury to Competition, Not Injury to a Competitor.*

Analysis of the statute shows that the proof of "injury" required is centered upon "competition" and not upon competitors. It is unlawful to discriminate where the effect is "to lessen competition" or tend to create "a monopoly in any line of commerce" or to "prevent competition". This, of course, is merely another manifestation of the classic antitrust theory that competition is "a contest for trade among business rivals in which some must gain while others lose, to the ultimate benefit of the consuming public". *Report of the Attorney General's National Committee to Study the Antitrust Laws* (hereinafter *Attorney General's Report*) 164 (1955). The courts, Congress, leading economists and other authorities are in accord.

As the court stated in *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F. 2d 786, 790 (7th Cir. 1951), cert. dismissed 344 U. S. 206:

> "* * * even if it [Minneapolis-Honeywell] did succeed in retaining or diverting some business, which might otherwise have gone to some of its competitors * * * it cannot be said that the effect of those practices was substantially to injure competition. And we construe the Act to require substantial, not trivial or sporadic, interference with competition to establish violation of its mandate."

The House Committee considering amendments to the Act agreed:

> "We must always distinguish between injury to competition and injury to a competitor * * * we cannot

guarantee competitors against all injury. This can only be accomplished by prohibiting competition." (H. Rept. 1422, 81st Congress, 1st Session, 1949, p. 6)

The *Attorney General's Report* at p. 165 states:

> "* * * criteria of competitive effect which focus exclusively on individual competitors' sales or profits rather than the health of the competitive process literally go beyond the terms of the law."

Dr. John D. Clark, member of President Truman's Council of Economic Advisers, in testimony before the House Committee on the Judiciary, stated:

> "All competitive effort is burdensome and harmful to those who cannot keep pace, but if we said it must stop short before it hurts anyone we would completely abandon the policy of competition."
>
> —Hearings, Subcommittee on Study of Monopoly Power, House Committee on the Judiciary, 81st Cong., 1st Sess., July 13, 1949, p. 113.

2. *The Record Affirmatively Shows There Was No Injury Within the Meaning of Section 2(a).*

Counsel in support of the complaint, before the Examiner, admitted that insofar as AB's St. Louis competitors were concerned, their business was "pretty well entrenched over a *regional area*" (R. 317), and he in effect admitted that "none of them were in failing circumstances by any means" (*ibid.*). He claimed that there was a loss of sales by these competitors to AB in St. Louis, but also admitted that the permanence of the switching from brand to brand was "not appreciable" (R. 316; see also R. 303, 233).

All of the competitors during the period of the price reductions were actively engaged in varied competitive activities: bringing out new labels (R. 351-52, 412), new packages (R. 351), and new products (*e.g., infra*, p. 66), reorganizing sales departments (Ex. 32, R. 222, 1184), changing distribution personnel (R. 412, 440), increasing advertising (R. 377), entering new markets (Ex. 33, R. 222, 1187), as well as making flexible adjustments in prices to market changes (R. 365, 454-55; Ex. 32, R. 222, 1182), special pricing promotions (R. 868, 915), and many other things.

There is nothing in the Commission's findings that contradicts any of these admitted and demonstrated facts. Instead, it has focused on the loss of sales by competitors which was admittedly temporary and "not appreciable" and has ignored all of the other factors which demonstrate continued vigorous competition in St. Louis.

This is true of both the January and June price reductions.

The January Price Reduction

At the time of the January price reduction of 25 cents a case, and for years prior thereto, the St. Louis market had been dominated by Falstaff, Griesedieck Western (hereinafter sometimes "GW") and Griesedieck Bros. (hereinafter sometimes "GB") whose combined share of the market totaled 83% (Ex. 18, R. 181, 1149). AB had only 5% to 13% of the St. Louis market, and it always ranked behind these other brewers (*ibid.*).

It was found that the first price reduction in January, 1954 was accompanied by changes in, and a stepping up of, sales activity by AB by changing its telephone solicita-

tion of orders to a route-wagon system of solicitation and delivery which converted every driver into a personal-solicitation salesman, and by a great expansion of its advertising in the St. Louis market (R. 26).

Nevertheless, despite all these changes, AB's share of the market increased from 13.1% in the last half of 1953 to only 16.5% in the first half of 1954 when this price reduction was in effect (computed from Ex. 231, R. 969, 1497-98).

Nor did competitors suffer. In each month during this reduction Falstaff's share of the market and sales volume increased over the same period of the prior year (Ex. 231, R. 969, 1497-98), and in June 1954 that company's beer sales in the St. Louis market exceeded those of any previous month in its history (Ex. 38, R. 224, 1194).

During the period of the first price reduction GB lost only 1.82% of the St. Louis market (R. 26).

GW had been continuously losing sales in St. Louis since 1948 (Ex. 18, R. 181, 1148-51). This trend continued during the period of AB's first price reduction. Its share of the St. Louis market during AB's January price reduction decreased 3.9 percentage points from the prior six months. However, this decrease was smaller than the decrease experienced by GW before AB reduced its prices in January.[20] And in all of these periods GW had between one-third and one-half of the total beer sales in St. Louis.

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[20] Computed from Ex. 231 as follows:

	GW Share of Market	*Difference*
First half of 1954	33.0 percent	-3.93%
Second half of 1953	36.93 "	-4.14%
First half of 1953	41.07 "	

Thus, there is no evidence, let alone "substantial evidence", to support a finding of injury from the January price reduction of 25 cents per case.

The June Price Reduction

During this second price reduction the competitive effectiveness of the other St. Louis brewers was not injured. The competitors in St. Louis—AB, Falstaff, GB and GW—had distribution through almost all the licensed retailers in St. Louis prior to the price reduction. No competitor of AB lost any retailer customer (R. 233). Every consumer, therefore, still had the same opportunity to buy any of those brands that he had before—and at the same price as previously since none of them changed its prices (R. 99, 100, 201, 211, 230).

Moreover, the two St. Louis competitors, on which information is available, continued to make profits (Ex. 32-Ex. 36, R. 222, 1181-91, R. 1219). "None of them were in failing circumstances by any means" (R. 317).

Total sales in the market increased by 800,000 cases over the corresponding period of the preceding year. The out-of-town brewers increased their sales in St. Louis from 448,134 cases to 490,088 cases (R. 55).

It is quite clear that during the period of the second, or June price reduction, from the end of June 1954 to the end of February 1955, AB's three principal St. Louis competitors sold less beer in St. Louis than they had in the corresponding period of the previous year. It is this fact upon which the Commission apparently bases its whole case. However, it is equally true that even if all the sales losses of the competitors could be attributed to AB's price

reduction—and they cannot be—then the maximum loss any one would have suffered as a result thereof would be less than 7% of its annual sales as in the case of GW.[21] GB's maximum loss would only be about 4%, and Falstaff's only about one-tenth of one percent! These "losses" were regained in substance when AB's price reductions, admittedly temporary, were terminated (R. 233, 303, 316).

Moreover, despite the price reductions in St. Louis, and its increase in sales there, AB's total sales dropped 13% in 1954. Far from other markets "subsidizing" St. Louis, St. Louis was supporting other areas.

In any event, the temporary sales losses in St. Louis fail to present a true picture of the state of competition or even a true picture of the competitors and their activities.

The Falstaff Brewing Corporation, owner of eight breweries, rose from twelfth in national sales in 1939, to sixth and fourth, in 1954 and 1955 respectively (Ex. 230, R. 969, 1493-96), despite the fact that Falstaff beer is sold in an area which includes only 36% of the nation's population (Ex. 32, R. 222, 1185; R. 146). While Falstaff's sales total *increased* in 1954 by 13%, AB's total sales *decreased* 13% (Ex. 230, R. 969, 1493-94).

Between July 1954, the first full month of AB's second price reduction, and February 1955, Falstaff's share of the St. Louis market rose from over 25% to about 30%. Its

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[21] No brewer sold all or even the majority of its beer in St. Louis only, and that was the only area of the price reduction in issue (Complaint, R. 6-7). GW with 28% of its total sales in St. Louis (R. 242, 56-57; R. 101) was the seller most dependent on sales in that market. In the eight months of AB's second price reduction, GW's St. Louis sales were off less than 33%. Simple arithmetic—28% of its volume multiplied by 33% reduction in sales multiplied by ⅔ of a year (the length of the reduction)—demonstrates that the maximum total loss of GW's sales is only 7%. Figures for other companies are computed similarly (R. 210, 199, 56-57).

gain of 4.5% of that market compares with AB's loss of 4% of the market during the same period. By January 1956 Falstaff controlled over 43% of the St. Louis market—a degree of acceptance that AB was never able to achieve even when both Budweiser and Falstaff were sold at the same price (Ex. 231, R. 969, 1497).

Any "loss" in St. Louis amounted to only one-tenth of 1% of Falstaff's annual sales, and its profits on net sales were equal to or greater than in its prior years (Ex. 32-Ex. 36, R. 222, 1181-91). Its net profits before taxes during 1954, when the alleged discriminations were taking place, were $6,787,000 (R. 1510).

With respect to Griesedieck Bros. Brewing Company, the Hearing Examiner stated:

> "respondent [AB] has shown that * * * in March 1954, G. B. replaced the beer it had theretofore been selling with an entirely new product which was badly named, poorly merchandised, bitter in taste and 'wild'—that is, with an unstabilized air content * * * that this new beer was disliked by the consumer, with the result that consumer sales thereof dropped sharply during the latter part of 1954. * * *" (R. 34)

A comparison of GB sales inside St. Louis with its sales outside St. Louis over a period of time, including the period of the price reductions, demonstrates that its losses in St. Louis were not due to AB's price reductions but to its own product difficulty. Any losses outside St. Louis necessarily were due to reasons other than the AB price reductions—particularly since all of its beer sold both in and outside St. Louis came from GB's one and only brewery. Appendix 3, comparing GB's sales inside and outside St. Louis, demonstrates: (1) that GB had been

losing sales both inside St. Louis and outside St. Louis for a period of years, even before AB reduced its prices in St. Louis; (2) that during all these periods GB had been losing more heavily in St. Louis than outside St. Louis; (3) that during the period of the June price reduction—the period when there was also a product failure—GB's rate of loss increased both in St. Louis and outside St. Louis, but that the losses outside St. Louis quintupled, while in St. Louis they only tripled.

From 1947, GW dominated the St. Louis market. Its annual share of the market ranged from a high of 47.6% in 1949 to a low of 38.9% in 1953. During that period there were times when GW's sales were more than 50% of the total sales in the market (Ex. 18, R. 181, 1150).

Prior to the sale of its brewing assets to Carling in October 1954, GW strengthened its cash position at the expense of its brewing business. Its expenditures for advertising in St. Louis decreased [from $337,000 in 1953 to $237,000 in 1954], while all other St. Louis competitors' advertising either remained at the same levels or increased (Ex. 119, R. 613, 1363-66). Although the corporation's cash and total current assets increased each year from 1948 to 1953, GW's management permitted its production facilities, the net fixed assets, to decrease every year during that period (Ex. 43, 44, 45, 49, 50, 51, R. 248-254, 1199-1212, 1226-39, all summarized at Rec. 174—not printed). And the ratio of fixed assets to total assets declined substantially from 1948 to 1953 (*ibid.*). By 1954 GW was in a very good quick cash position. GW had continued to earn profits even during both of AB's price reductions; its net profits before taxes in the first eight months of 1954 were $782,000 (R. 1512). It was, as it admitted at

the time, "a most successful company" (Ex. 39, R. 246, 1195). In 1954, under the management of an investment banker (Ex. 46, R. 249, 1221), it sold its production assets and submitted to a stockholder vote (Ex. 46, R. 249, 1213, 12'4, 1221) the question of whether it should become an investment company using the funds thus made available.

GW sold "all its brewing assets" to Carling Brewing Company in the middle of the second AB price reduction (Ex. 39-40, R. 246, 1195-97; Ex. 46, R. 249, 1213). The net equity available to common shareholders of GW thereafter was higher than any level which the stock had reached in the prior two years (Ex. 46, R. 249, 1213, 1218, 1223). Carling paid over $2,000,000 for goodwill, or more than one-fifth of the real net worth (Ex. 46, R. 249, 1217-18; Rec. 800-02—not printed). The value paid for goodwill by Carling is a concrete expression of the continued profitability and competitive effectiveness of GW.

As soon as Carling's experienced management took over the marketing of GW's Stag Brand, GW's position in the market showed marked improvement, even during the balance of the period of AB's second price reduction. Thus, in January 1955, its rate of loss was halved and its percentage of market increased about five percentage points. In February 1955 it showed an increase in sales over the prior year (Ex. 231, R. 969, 1497). By 1956 its beer sales in St. Louis were *above* the sales which could have been reasonably expected, based upon its trend in the years prior to AB's price reduction (Ex. 234, R. 969, 1507; R. 593-95, 968).

AB never was able to reach the 43% market share that Falstaff has obtained, even when Budweiser was selling at the same price as Falstaff. It has never attained the high

market share that GW held after 1947 (Ex. 18, R. 181, 1148; Ex. 231, R. 969, 1497). AB's national sales decreased 13% in 1954 despite both price reductions (Ex. 230, R. 969, 1493, see also Ex. 118, R. 604, 1359). It is not a dominant seller in any market. The finding of AB's tendency to monopolize the St. Louis market, or any other market, on these facts is completely far-fetched.

3. *Temporary Diversion of Sales of Some Competitors Does Not Constitute Substantial Injury to Competition Within the Meaning of Section 2(a).*

The sole basis for the Commission's conclusion that AB's price reduction injured competition rests on its findings that competitors temporarily lost sales to AB. In this respect we have shown that Falstaff lost substantially no sales (only 1/10 of 1%), and that AB's price reduction did not cause GB's or GW's loss of sales, but that product failure and management accounted for the 4% and 7% losses respectively of those companies in St. Louis. Moreover, it has been shown that during the same period AB lost 13% of its annual sales despite its price reduction in St. Louis.

Still more significant, diversion of sales is the very essence of competition. In no previous territorial price case in which an order or judgment was entered against a defendant has this been the basis for the order. In no previous territorial price case in which the charge has been dismissed has a competitor's losses prevented a dismissal.

"Competition is a contest between sellers for the business of a buyer. In such a contest one seller gets the order while other sellers lose the order. That is

competition. The seller who did not get the order may feel injured, but that does not mean that competition has been injured. In any competitive economy we cannot avoid injury to some of the competitors. *The law does not, and under the free enterprise system it cannot, guarantee businessmen against loss.* That business men lose money or *even go bankrupt does not necessarily mean that competition has been injured.* 'Competition,' Mr. Justice Holmes observed, 'is worth what it costs'.

"We must always distinguish between injury to competition and injury to a competitor. To promote and protect competition is the primary function of the antitrust laws. However, we cannot *guarantee competitors against all injury.* This can only be accomplished by *prohibiting competition.*"

H. Rept. No. 1422, 81st Cong., 1st Sess. 1949, p. 5, quoted with approval in part by Yankwich, J. in *Balian Ice Cream Co.* v. *Arden Farms Co.*, 104 F. Supp. 796, 801 (S. D. Calif. 1952), *aff'd* 231 F. 2d 356 (9th Cir. 1955), cert. den. 350 U. S. 991 (Emphasis added by the Court.)

As stated by the Commission in its long-standing Policy Toward Geographic Pricing Practices, 1 CCH Trade Reg. Reporter ¶ 3601.31 (10th Ed.):

"Injury to competition which one seller imposes upon another raises few problems, since it is a conception which can be traced back to the beginnings of the antitrust laws. It usually arises when the discriminating seller quotes low prices to the customers of his competitors in such a way that he jeopardizes the continuance of effective competition by these competitors and thus tends to acquire a monopoly of the commodity sold. Except where such a tendency toward

monopoly appears, *the Commission does not regard an effort to get business from a competitor by sporadic price reductions as illegally injurious to that competitor.*" (Emphasis added.)

In none of the territorial price cases was a violation found solely on the basis of a loss of sales by a competitor. Rather, there were other factors showing a diminution in the competitive effectiveness of those competitors before a finding of statutory injury to competition was made. Such other factors bearing on continued competitive effectiveness were present in all cases where a charge of territorial price discrimination under Section 2(a) was sustained. A review of these cases, *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234 (2d Cir. 1929); *E. B. Muller & Co.* v. *FTC*, 142 F. 2d 511 (6th Cir. 1944); *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115 (1954); *Maryland Baking Company* v. *FTC*, 243 F. 2d 716 (1957); and *Atlas Building Products Company* v. *Diamond Black & Gravel Company*, 269 F. 2d 950 (10th Cir. 1959), reveals that each of them contains one or more of the following elements bearing upon the vigor of competition:

1. There was a single competitor in the area of the price reduction whose sales were confined to that area, and who was, therefore, highly vulnerable. Elimination or crippling of such a competitor perforce injured competition.

2. The price was reduced to a point so low that the sole competitor in the area could not effectively compete, except in one of the cases, and in that one, *Porto Rican*, the discriminator's prices were found to be below cost.

3. The discrimination was continued for a period sufficient to cause destruction of the sole competitor or to seriously impair the competitive effectiveness of that sole competitor.

4. The discrimination resulted in the single competitor losing its channel of distribution, i.e. it lost not just sales, but outlets through which it could make sales—wholesalers.

Not even one of these factors, or any equivalent of them was present in *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356 (9th Cir. 1955), cert. den. 350 U. S. 991, nor is any one present in the instant case. AB does not contend that the above four factors are the *sine qua non* for a finding of injury to competition. AB submits, however, that when all competitors are and have been completely active, competing vigorously and profitably, some such factors in addition to mere loss of sales are required to establish injury to competition under Section 2(a). Otherwise, the injury does not result from the discrimination, as the statute requires, but from the lower price—which would be equally true if prices were uniformly low and thus non-discriminatory.

In the present case, AB was faced not with the competition of one small competitor but rather with the competition of three substantial competitors each of whose sales in St. Louis were up to three and four times greater than AB's prior to the price reductions. Indeed, counsel in support of the complaint conceded that "this is not the case of a big dog in a particular locality trying to gobble up one or two small local dogs" (R. 316), and that "the St. Louis competitors" of AB were "firmly entrenched in that area" (R. 317, 1509). Nor were they

dependent upon St. Louis sales for their profit, since all of them sold in no less than 13 states. Moreover, Falstaff, the principal competitor whose price AB was meeting, was the sixth largest brewer in the nation and became fourth largest in 1955 *despite* AB's price reductions.

In view of the above, AB submits that no injury to competition within the meaning of Section 2(a) resulted, or could reasonably be expected to result, from its temporary price reductions in St. Louis.

B

AB Was Meeting an Equally Low Price of a Competitor in Good Faith Within the Meaning of the Absolute Defense in Section 2(b) When It, While Seeking Means to Offset a Widespread Loss of Sales, Temporarily Reduced Its Prices in Its Home Market to Prices Which Were Always Higher Than or Equal to Those of Its Principal Competitor, Whose Sales Were Greater Than AB's in the Many Markets in Which They Competed.

It is an absolute defense to a charge of illegal price discrimination that the alleged discriminator met the equally low price of a competitor in good faith. *Standard Oil Co.* v. *FTC*, 340 U. S. 231; 233 F. 2d 649 (7th Cir. 1956), aff'd 355 U. S. 396. Being an "absolute defense", the defense is available even if we assume, *arguendo*, there was injury to competition. *Ibid.* Hereafter this defense shall be referred to as the meeting competition defense.

1. The Meeting Competition Defense Is Available Against a Charge of Territorial Price Discrimination.

In providing for the meeting competition defense, Section 2(b) draws no distinction between the different types of price discriminations, either territorial or among particular individual customers. It follows that the meeting competition defense is available against *any* charge of price discrimination under the Act, including alleged territorial discrimination. In affirming the absolute nature of the defense, this Court, in the *Standard Oil* case, did not, either explicitly or by the most tenuous inference, suggest that the defense would be any less absolute or less available in a territorial case charging primary-line injury than in a secondary-line case.

Under these circumstances the only question regarding the availability of this defense in territorial cases is: may a seller meet the equally low price of its competitors where it is able to do so, or is it at the mercy of its competitors in the selection of the territory? To state the problem is really to answer it. If a seller is not able to reduce its price to meet a competitor's price in the only territory where it is able, then, in order to reduce prices in that single territory it would have to reduce them everywhere. The same reasoning which this Court applied in the *Standard Oil* case to a secondary-line problem is equally applicable to this primary-line situation:

> "There is nothing to show a congressional purpose, in such a situation, to compel the seller to choose only between ruinously cutting its prices to all its customers to match the price offered to one, or refusing to meet the competition and then ruinously raising

its price to its remaining customers to cover increased unit costs."—340 U. S. 231, 250

The Commission has placed itself in an anomalous position. It argues in its Opinion:

> "The emphasis of Section 2(b) is on individual competitive situations rather than upon a general system of competition. *F. T. C. v. A. E. Staley Mfg. Co.*, 324 U. S. 746. If respondent was faced with an individual competitive situation which it had to meet, it clearly was not in the St. Louis area. However more advantageous it may have been for respondent to lower its prices there, by so doing it has no defense under 2(b)." (R. 58)

Thus, the Commission would emasculate the absolute statutory defense by insisting that AB could not meet competition in a market where it was not then losing business, even though it was losing business at the same time to the same competitor in other markets. It so held notwithstanding its recognition that it was "more advantageous" for AB to meet the competitive price in St. Louis than elsewhere. In fact, of course, due to the freight rate problem and others, it was not only more advantageous for AB to do so in St. Louis, but it was the only possible place in which it could do so.

This anomaly reflects the futility of taking language from a case involving one set of facts and attempting to apply it to another. True, this Court indicated in the *Staley* case that the meeting competition defense should be allowed in "individual competitive situations". However, *Staley* was a price-fixing case where the "individual competitive situation" doctrine forestalled the use of the meeting com-

petition defense as a cover for a collusive price-fixing mechanism. See *Standard Oil Company* v. *FTC*, 233 F. 2d 649, 653 (7th Cir. 1956), aff'd 355 U. S. 396.

There is no remote equivalence between AB's price reductions in St. Louis and the systematic price *matching of both lower and high prices* which was disqualified by this Court in *Staley*. The facts in this case amply—and dramatically—underscore the good faith efforts of AB to cope with the particular grave competitive situation created by Falstaff.

As this record demonstrates, from time to time and from place to place over the course of the past twenty years, Budweiser has generally sold at a price somewhat higher than prices of other leading beers. The competitive effects of such differences between Budweiser and other brands were accentuated subsequent to October 1953 when new wage contracts were negotiated throughout the industry. Many brewers raised prices; some brewers absorbed the increased costs. AB raised its prices slightly in all markets except those in Missouri and Wisconsin. Falstaff elected to absorb the increased costs. AB sales dropped drastically (R. 22). Sales of the regional brewers, such as Falstaff which competes with AB in substantially all of the states served by AB's St. Louis brewery, increased markedly. The increased volume permitted Falstaff to expand its productive facilities by buying breweries strategically located, thereby increasing its competitive advantages even more.

Rather than adopt the alternative of raising its price once again, a course already proved disastrous in its effect on sales, AB chose to meet the price competition of Falstaff for consumer sales. St. Louis, with its great sales potential, afforded AB the greatest natural advantage.

When counsel in support of the complaint asked AB's president why AB did not reduce its price in Texas where AB was experiencing a drastic loss of sales to Falstaff, he testified:

> "And if I could have made our reduction in Texas instead of St. Louis, I think we would have done it without any argument.
>
> "Our principal reason for not making it in Texas was because Falstaff again has a plant in New Orleans which is located, as you well know, very close to Texas. We have freight rates out of St. Louis that are higher, and even today it would be a little bit more competitive because Falstaff has just acquired two more plants in the State of Texas, and they lead by a good majority in the State of Texas today." (R. 930; see also R. 287-88, 1172)

The competition of Falstaff dramatizes the only type of individual competitive situation which realistically would serve as the basis for the absolute meeting competition defense in a territorial price case.

2. *When Selling Budweiser at Prices Which Were Always Higher Than or Equal to the Price of Falstaff and the Other Beers, AB Was Meeting an "Equally Low Price" of a Competitor Within the Meaning of Section 2(b).*

After AB's price reduction of June 21, 1954, all beers were sold in St. Louis for $2.35 per case. As the Complaint alleges, AB's price then "exactly matched" the price of its competitors (R. 5).

Despite the fact that AB's price of $2.35 was the same as Falstaff's, the Commission ruled that the two AB price reductions were not meeting an "equally low price" of a

competitor within the meaning of the statute (R. 40). The Commission stated that AB's "reduction from the premium price *to match the prices* of the regional beers on the market was not a meeting of competition. The effect was to undercut competition." (R. 59).

The Commission has, in effect, amended Section 2(b) to make it read "an equally low price for goods of equal public acceptance." Such an interpretation is incompatible with the clear words of the statute. It is also contrary to the legislative history of the Act.

The House Judiciary Committee, which drafted the clause that became Section 2(b), explained it as follows:

> "This proviso represents a contraction of an exemption now contained in section 2 of the Clayton Act which permits discriminations without limit where made in good faith to meet competition. It should be noted that while the seller is permitted to meet local competition, it does not permit him to cut local prices until his competitor has first offered lower prices, and then he can go no further than to meet those prices. * * * *In other words, the proviso permits the seller to meet the price actually previously offered by a local competitor*"—H. Rep. 2287, 74th Cong., 2d Sess. 16, cited in *Standard Oil Co. v. FTC*, 340 U. S. 231, 248 (1951). (Emphasis added.)

Mr. Patman, one of the co-authors of the Act, gave further content to the statutory phrase "equally low price" as follows:

> "The phrase 'equally low price' means the corporate chain will have the right to compete with the local merchants. They may meet competition, which is all right, but they cannot cut down the price below cost for the purpose of destroying the local man.

"It means they may meet competition, but not cut down the price below cost. It *means on equally low price but not below that.* It permits competition, but it does not permit them to cut the price below cost in order to destroy their competitors."—80 Cong. Rec. 8235

The Commission has presented this theory of "superior public acceptance" to the courts previously. *Standard Oil Co. v. FTC*, 233 F. 2d 649 (7th Cir. 1956) aff'd 355 U. S. 396. The Commission had found as follows, and ruled against the respondent:

"The offer of Red Indian Oil Company was on Fleet Wing gasoline which, as has been previously found, was *not a major brand* of gasoline. In the trade sense, it was an offbrand and *generally sold at prices lower than major brands* of gasoline.

"There was no evidence as to whether or not Fleet Wing gasoline was of comparable grade or quality with respondent's gasoline. Regardless of this, in the retail distribution of gasoline *public acceptance rather than chemical anaysis of the product is the important competitive factor.* Certain widely distributed and well advertised brands of gasoline have come to be known as major brands, and other brands are known as off brands. In the Detroit metropolitan area, as elsewhere, *off-brand or local-brand gasoline sells at lower prices than major brands, and distributors of off-brands gasoline find it necessary to undersell major brands in order to secure some share of the market.*" (49 F. T. C. 923, 952 (1953). (Emphasis added.)

The Court of Appeals set aside the order of the Commission. In doing so, it implicitly denied the validity of the "superior public acceptance" theory. The meeting competition defense was upheld.

In taking the approach that it has in this case, the Commission attempts to invoke the *results* of the price reduction to defeat the meeting competition defense:

> "[R]espondent's [AB's] reduction from the premium price to match the price of the regional beers on the market was not a meeting of competition. The *effect* was to undercut competition. *The huge gains which respondent* [AB] *made at the lower prices testifies to that fact.*" (R. 59)

It is well established that the availability of the meeting competition defense cannot be made to rest upon the results of the alleged discrimination, however. *Standard Oil Co.* v. *FTC*, 340 U. S. 231.

In 1953, prior to the price reductions of AB in St. Louis, Falstaff's packaged beer sales exceeded the sales of Budweiser by 135% and constituted 29.4% of the total St. Louis market. For the year 1954 Falstaff sold 29.6% of the market, in 1955 37.3%, and in January 1956 it was approximately 43% (Ex. 231, R. 969, 1497). While AB and Falstaff were selling at the same price their sales were at times approximately comparable (*Ibid.*).

Under these circumstances it is impossible as a matter of fact to claim that AB was undercutting its competitors.

3. *In Meeting the Exact Price of Its Competitor in Only One Location, Where It Could Increase Sales, Instead of All or Other Locations, While Testing Other Means To Offset Its Loss of Sales, AB Was Meeting Competition in Good Faith Within the Meaning of the Statute.*

St. Louis was the only market in which AB could reduce prices where the results could be effective in terms of

increased sales which were urgently necessary. However, the Commission held:

> "The justification provided by Section 2(b) for discrimination in price contrary to the provision of Section 2(a) is essentially a right of self-defense against competitive price attacks."[22]

Such a ruling ignores the fact that AB had been losing sales over a wide area and was merely attempting to offset these losses. That ruling, grounded in the competitive limitations of secondary line cases, has no validity in a territorial case such as this, where distribution by all competitors in any given market is through common customers to whom all competitors sell.

While *Standard Oil* speaks in terms of meeting a competitor's lower price in order to retain existing customers, it is essential to recognize that the Court there spoke in the context of the facts of *that* case. The *only* question of meeting competition in *Standard Oil* arose in connection with "price raids" by competitors bent on wresting away four of Standard Oil's customers. Standard's lower price was offered to "retain" those customers. In holding the meeting competition defense available, the Court's decision was logically responsive to the limited facts—the only issue—before it. *Standard Oil Co.* v. *Brown*, 238 F. 2d 54 (5th Cir. 1956). The Court did not hold that retention of existing customers was the *only* legitimate defensive ground for meeting a competitor's lower prices.

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[22] "None of the competitors constituted any threat at that time to respondent's [AB's] relative position in the St. Louis market." —Commission opinion (R. 58)

AB's relative position in the St. Louis market was last place, and it had been for years (Ex. 18, R. 181, 1148).

To suggest that the meeting competition defense is available only in the factual setting in which it arose in *Standard Oil* is to flout logic, business realities and ordinary statutory construction. Thus, the *Attorney General's Report*, at 184, stated:

> "Standard Oil does not confine the 'good faith' proviso solely to *defensive* reductions to retain an *existing* customer. The Supreme Court in that opinion merely employed language describing the case at bar; it did not promulgate a general doctrine surrounding each seller with a protected circle of customers which may be exploited without fear of a rival's price attacks. Such a limitation in any event would not be in keeping with elementary principles of competition, and would in fact foster tight and rigid commercial relationships by insulating them from market forces." (Original emphasis.)

Any other interpretation would be unreasonable. A monopolist would be able to reduce its prices to retain all its custom; but a new entrant in a field would be unable to reduce its prices to gain a foothold. Like the "individual competitive situation" maxim, the "aggressive-defensive" distinction must be reasonably applied in this new factual situation.

Practically all retailers in St. Louis handle Budweiser, Falstaff and other beers (R. 233; Ex. 202 K, R. 967, 1513). If the only time AB could meet the competition of Falstaff was to retain the business of a particular retailer, the defense would never be available. There is nothing in the statute to indicate that the absolute defense is not to be available when all sellers have common customers.

As pointed out above, increasing sales is the very essence of competition. Likewise, it is the essence of meeting competition. As the Commission stated in a memorandum dated June 16, 1953, to the Senate Judiciary Committee:

> "The only reason a seller would ever reduce his price in good faith to meet the equally low price of a competitor is either to *obtain the business* of the customer or to retain him as a customer * * *"

In *Balian Ice Cream Co.* v. *Arden Farms Co.*, 104 F. Supp. 796, 801 (S. D. Calif. 1952), aff'd 231 F. 2d 356 (9th Cir. 1955), cert. den. 350 U. S. 991, Chief Judge Yankwich stated that the precise issue in that case was whether a seller could lower its price when sales were diminishing "in an endeavor to keep their customers *or gain others.*" The court held that Arden, in reducing prices in a geographic area for such a purpose, was excused under the meeting competition defense.

In short, AB met the equally low price of competitors in good faith, in the individual competitive situation presented by the facts of this primary line case. The absolute defense should be sustained.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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APPENDIX 1

Spread Between Price Levels in the Largest Market for Budweiser in Each of 49 States and the District of Columbia

(in dollars and cents per case of 24 12 ounce returnable bottles)

(Source: Ex. 180 through 228D)

Market	*Amount of Difference Between Successive Price Levels*					
	Between 1 & 2	**Between 2 & 3**	**Between 3 & 4**	**Between 4 & 5**	**Between 5 & 6**	**Between 6 & 7**
olulu, Hawaii	.08	.35	.50	.10	.40	—
yenne, Wyo.[1]	.40	.10	.06	.19	—	—
ttle, Wash.[2]	.15	.82	.04	—	—	—
hmond, Va.	.55	.65	—	—	—	—
lington, Vt.[3]	.85	.15	.05	.10	—	—
Lake City, Utah[4]	.05	.28	1.42	—	—	—
las, Tex.	.15	.60	.10	—	—	—
xville, Tenn.	.15	.25	.67	—	—	—
id City & dwood, S. D.[5]	.05	.05	.05	.05	.45	—
arleston, S. C.	1.05	—	—	—	—	—
lison, Wisc.[6]	.06	.83	—	—	—	—
eeling, W. Va.	1.10	—	—	—	—	—
mberland Hill, R. I.[7]	.04	.06	.20	.42	.10	.04
iladelphia, Pa.[8]	.10	.15	.25	.70	.20	—
rtland, Ore.[9]	.84	.10	—	—	—	—
sa, Okla.	.69	.44	—	—	—	—
(Euclid) veland, Ohio[10]	1.10	—	—	—	—	—
ot, No. Dak.	.10	.15	.02	—	—	—
lmington, N. C.[11]	.45	.56	—	—	—	—
w York, N. Y.[12]	.10	.28	.42	—	—	—
uquerque, N. M.[13]	.02	.09	.03	.16	.31	.24
arney, N. J.[14]	.01	.03	.13	.12	.42	.20
mingham, Ala.	.90	—	—	—	—	—
enix, Ariz.[15]	.01	.80	—	—	—	—
tle Rock, Ark.	.70	—	—	—	—	—
Angeles, Calif.[16]	.71	.01	.03	.09	.27	.01
ver, Colo.[17]	.30	.22	.29	.34	—	—
t Hartford, Conn.	.80	.11	.03	.04	.06	.14
lmington, Del.	.69	.45	—	—	—	—
trict of Columbia	1.00	.06	—	—	—	—
ami, Fla.	.50	.05	.90	—	—	—
anta, Ga.	.90	—	—	—	—	—
ho Falls, Idaho[18]	.67	.03	—	—	—	—
cago (Logan), Ill.[19]	.02	.10	.01	.02	.19	.08
t Chicago, Ind.	.25	.65	—	—	—	—

Appendix 1

Market	Between 1 & 2	Between 2 & 3	Between 3 & 4	Between 4 & 5	Between 5 & 6	Betwe[illegible] 6 & 7
Des Moines, Iowa	.08	.07	.30	—	—	—
Wichita, Kan.[20]	.10	.10	.50	.15	—	—
Louisville, Ky.	.97	—	—	—	—	—
New Orleans, La.[21]	.50	.70	—	—	—	—
Waterville, Me.	.23	.28	.09	.11	.07	[illegible]
Baltimore, Md.	.04	—	—	—	—	—
Boston, Mass.[22]	.17	.15	.17	.09	.09	[illegible]
Detroit, Mich.	1.05	.15	—	—	—	—
St. Paul, Minn.[23]	.02	.27	.02	.09	.03	[illegible]
Columbus, Miss.	.82	—	—	—	—	—
St. Louis, Mo.	.30	—	—	—	—	—
Billings, Mont.	.10	.95	—	—	—	—
Omaha, Neb.[24]	.10	.20	.35	.15	.10	—
Las Vegas, Nev.[25]	.30	.19	.24	—	—	—
Concord, N. H.[26]	.14	.39	.17	.06	.20	[illegible]
Spread						
Avge.:	.41	.30	.26	.17	.21	[illegible]
High:	1.10	.95	1.42	.70	.45	[illegible]
Percentiles						
25th:	.10	.10	.015	.09	.09	[illegible]
50th:	.275	.195	.17	.105	.195	[illegible]
75th:	.71	.445	.325	.16	.31	[illegible]
No. of Markets	50	40	27	18	14	[illegible]

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1. The price of Coors is adjusted to account for the 11 oz. bottle.
2. The prices of Hamms, Olympia, Rainier, Heidelberg, and Lucky Lager are a[illegible] to account for the 11 oz. bottle.
3. Prices of Ruppert, Schaefer, and Ballantine are based on a quantity m[illegible] quantities not stated. Other prices are based on a flat rate for all quantitie[illegible]
4. There is a quantity discount applicable to all beers. The price of Coors is a[illegible] to account for the 11 oz. bottle and the price of Budweiser is adjusted to acco[illegible] the 10 oz. bottle and to facilitate comparison to the standard 12 oz. bottle.
5. Price for Schlitz based on a quantity minimum of 100 cases, price for Falsta[illegible] on a quantity minimum of 25 cases. All others priced at a flat maximum[illegible]
6. All prices based on a quantity minimum of 100 cases.
7. All prices based on a quantity minimum. Quantity not stated.
8. Prices are all based on quantity minimum as follows: Budweiser, Schlitz, P[illegible] Ballantine, Scheidt, Neuweiller, Schmidt, Ortlieb, Esslinger, Gretz at 100 cases[illegible] Piel's and Schaefer at 25 cases.

Appendix 1

9. The prices of Hamms, Burgermeister, Goebel, Blatz, Lucky Lager, Rainier, Heidelberg, and Olympia are adjusted to account for the 11 oz. bottle. Since Schlitz is distributed in both 11 oz. and 12 oz. bottles, the 11 oz. bottle price has been disregarded.

10. The pricing survey used for Cleveland is from the firm which has the largest number of outlets.

11. Price for Regent only is based on a quantity minimum.

12. Prices are based on a quantity minimum as follows: Budweiser, Schlitz, and Miller 100 cases. Pabst 200 cases. All others are priced at a flat rate. The New York City prices are a combination of Bronx and Brooklyn.

13. The price of Coors is adjusted to account for the 11 oz. bottle.

14. Prices of following are based on a quantity minimum as indicated: Budweiser, Schlitz, Miller, Hensler at 100 cases, Pabst at 200 cases, Blatz at 25, and Fox Head at 10.

15. The price of Coors is adjusted to account for the 11 oz. bottle.

16. The prices of both Coors and Olympia are adjusted to account for the 11 oz. bottle and to facilitate comparison to the 12 oz. beers.

17. The price level of Falstaff beer is based on the quantity minimum: 25/$2.84. The price of Coors is adjusted to account for the 11 oz. bottle.

18. The prices of Olympia, Rainier, and Heidelberg are adjusted to account for the 11 oz. bottle. Since Budweiser is also sold in the 12 oz. bottle, the price of the 11 oz. bottle is disregarded.

19. The price level of all beers is based upon a quantity minimum: Budweiser 25/$3.30; Hamms 25/$3.27; Pabst 25/$3.29; Old Style Lager 25/$3.08; Drewry's 100/$2.57; Prager 100/$2.57; Meister Brau 100/$2.58; Fox De Luxe 50/$2.58; and Tavern Pale 30/$2.56. Where there are no quantity minimums the flat maximum price is used.

20. A cash rebate applicable to all beers is disregarded. The price of Coors is adjusted to account for the 11 oz. bottle.

21. The Goebel figures are based on the 12 oz. bottle beer only.

22. The price survey for Boston is from a Cambridge, Mass. firm.

    Prices are based on a quantity minimum as follows: Dawson Beer and Harvard Ale at 25 cases; Hampden Ale at 100 cases. All other prices are a flat rate since no quantity minimum price is stated.

23. The prices of Schlitz, Pabst, Hamms, and Pfeiffers are based on the quantity minimum price. Quantity not stated.

24. Prices of Country Club are based on a quantity minimum of 25. Prices of Metz are based on a quantity minimum of 50 cases.

25. The prices of both Coors and Olympia are adjusted to account for the 11 oz. bottle.

26. All prices are based on a quantity minimum as follows: Budweiser, Schlitz, Pabst, Ruppert, Rheingold at 25 cases; Schaefer, Narragansett, Harvard, Pickwick, Dawson, and Kreuger at 10 cases; Ballantine at 5 cases.

APPENDIX 2

Excerpt from
House of Representatives Judiciary Committee
Report on the Clayton Act
63d Congress, 2d Session, Report No. 627

II.

Price Discriminations.

Section 2 of the bill is intended to prevent unfair discriminations. It is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations and also certain smaller concerns which seek to secure a monopoly in trade and commerce by aping the methods of the great corporations, have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country. This section expressly forbids discrimination in price between different dealers of commodities that are sold for use, consumption or resale within the United States or any place within its jurisdiction, when such discrimination is made with the purpose or intent to thereby destroy or wrongfully injure the business of a competitor, either of such dealer or seller. It will be observed that the language used makes this section applicable only to domestic commerce or, in other words, its application is restricted to commerce carried on in the United States or in places under the jurisdiction thereof, and has no reference to commodities sold either in this country or abroad which are intended solely for our export trade. The violation of any of the provisions of this section is made a misdeameanor, and is made punishable by fine or imprisonment, or both. There are two pro-

visos in this section which are important. The first proviso permits discrimination in prices of commodities on account of differences in grade, quality and quantity of the commodity sold, or that makes only due allowance for difference in the cost of transportation. The second proviso permits persons selling goods, wares and merchandise in commerce to select their own customers, except as provided in Section 3, which will be considered later. The necessity for legislation to prevent unfair discrimination in prices with a view of destroying competition needs little argument to sustain the wisdom of it. In the past it has been a most common practice of great and powerful combinations engaged in commerce—notably the Standard Oil Co., and The American Tobacco Company, and others of less notoriety, but of great influence—to lower prices of their commodities, oftentimes below the cost of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made. Every concern that engages in this evil practice must of necessity recoup its losses in the particular communities or sections where their commodities are sold below cost or without a fair profit by raising the price of the same class of commodities above their fair market value in other sections or communities. Such a system or practice is so manifestly unfair and unjust, not only to competitors who are directly injured thereby, but to the general public, that your committee is strongly of the opinion that the present anti-trust laws ought to be supplemented by making this particular form of discrimination a specific offense under the law when practiced by those engaged in commerce.

Appendix 2

The necessity for such legislation is shown by the fact that 19 States have enacted laws forbidding this particular form of discrimination within their borders. These State statutes have practically all been enacted in the last few years, and most of them in the years 1911, 1912 and 1913. It is important these State statutes be supplemented by additional legislation by Congress, for it is now possible for one of these great corporations doing business in not only the 48 States but throughout the world to lower the prices of its commodities in a particular State and sell within that State at a uniform price in compliance with State laws, and thereby destroy the business of all independent concerns and competitors operating within the State. The loss incurred by such gigantic effort in destroying competition can be more than regained by general increase in the prices of their commodities in other sections. In fact, complaint has been made to your committee that efforts have been made by certain great corporations engaged in commerce in some of the States which have enacted statutes forbidding such discrimination to circumvent the State laws by the methods above described. In seeking to enact Section 2 into law we are not dealing with an imaginary evil or against ancient practices long since abandoned, but are attempting to deal with a real, existing, widespread, unfair and unjust trade practice that ought at once to be prohibited, insofar as it is within the power of Congress to deal with the subject. This we think is accomplished by Section 2 of this bill. As further showing the necessity for such legislation, we call attention to the States which have heretofore adopted statutes varying in form, but for the purpose of preventing unfair discriminations in price, as follows:

1. Arkansas, act 1905, as amended March 12, 1913.
2. Idaho, antitrust act of 1911.

Appendix 2

3. Iowa, Revised Statutes.
4. Louisiana, act of 1908.
5. Missouri, Revised Statutes.
6. Nebraska, act of 1913.
7. New Jersey, act of 1913.
8. North Carolina, act 1913.
9. Oklahoma, act 1913.
10. South Carolina, act 1902.
11. Utah, act 1913.
12. Wisconsin, act 1913.
13. Wyoming, Revised Statutes, 1911.
14. Kansas, act 1905.
15. Michigan, act 1913.
16. Massachusetts, act 1912.
17. Montana, act 1913.
18. North Dakota, act 1913.
19. California, act 1913.

APPENDIX 3

Griesedieck Bros. Package Beer Losses in St. Louis Compared to Losses Outside St. Louis

	Sales in St. Louis			Sales Outside St. Louis		
	Sales (Cases)	*Loss* (Cases)	*%* *Change*	*%* *Change*	*Loss* (Cases)	*Sales* (Cases
1st 6 Mos. 1952	1,034,524					4,133,4
1st 6 Mos. 1953	901,931					3,788,9
		132,593	–12.8	–8.3	344,542	
Last 6 Mos. 1952	1,094,465					3,925,2
Last 6 Mos. 1953	952,106					3,833,0
		142,359	–13.0	–2.4	92,232	
1st 6 Mos. 1953	901,931					3,788,9
1st 6 Mos. 1954	784,835					3,636,7
		117,096	–13.0	–4.0	152,233	
Last 6 Mos. 1953	952,106					3,833,0
Last 6 Mos. 1954	585,636					3,091,9
		366,470	–38.5	–19.3	741,061	
1st 6 Mos. 1954	784,835					3,636,7
1st 6 Mos. 1955	424,577					2,569,4
		360,258	–45.9	–29.3	1,067,313	

(Source: Comm. Ex. 70, R. 1071; Ex. 179, R. 147